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No. 80-

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term 1980

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JAMES HENRY SMITH,
*Petitioner,*

v.

STATE OF WASHINGTON,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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## ISSUE PRESENTED FOR REVIEW

Whether the Fourth Amendment creates a right to privacy in the home which requires some substantial state justification for forcible intrusions into private dwellings to enforce statutory prohibitions of purely private conduct, even if that conduct does not involve the exercise of distinct Constituitional rights.

## QUESTION PRESENTED

Whether the decision of the Supreme Court of Washington, denying the existence of a distinct constitutional right to privacy against official invasions of one's home unsupported by a legitimate state interest, is in conflict with this Court's decision in Stanley v. Georgia, 394 U.S. 557 (1969), and with the language and intent of the Fourth Amendment.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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James Henry Smith prays that a writ of certiorari issue to review the decision of the Supreme Court of Washington affirming his felony conviction for possession of marijuana for his own use in his own home.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington affirming petitioner's conviction, four Justices dissenting, is published at 93 Wn.2d 329, and set out as Appendix A. The trial court's Decision rejecting petitioner's constitutional claim is unpublished, and set out as Appendix B.

## JURISDICTION

The decision of the Supreme Court of Washington was issued on April 24, 1980. This Petition is being filed within 90 days of that date.[1] Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

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[1] By Order dated April 14, 1980, effective June 30, 1980, this Court's Rule 20.1 was amended to require that Petitions for Certiorari in criminal cases from state courts be filed "within 60 days after entry of such judgment." Petitioner has assumed that this amendment did not retroactively make this Petition late. If it did, the defect is not jurisdictional, Fuller v. Alaska, 393 U.S. 80 (1968), and petitioner would respectfully move the Court for leave to file this Petition out of time.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the law of the State of Washington:

RCW 69.50.204:

> (a) The controlled substances listed in this section are included in Schedule I.
>
> * * *
>
> (d) Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation: . . .
>
> * * *
>
> (10) Marihuana; . . .

RCW 69.50.401(c):[2]

> (c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (d) of this section.

RCW 69.50.401(d):[2]

> (d) Except as provided for in subsection (a)(1)(ii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

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[2] By laws of Washington 1979, ch.67 §1, an additional section to RCW 69.50.401 was added numbering former subsections (c) and (d), subsections (d) and (e) respectively.

RCW 69.50.509:

> If, upon the sworn complaint of any person, it shall be made to appear to any judge of the superior court, justice of the peace, district court judge or municipal judge that there is probable cause to believe that any controlled substance is being used, manufactured, sold, bartered, exchanged, administered, dispensed, delivered, distributed, produced, possessed, given away, furnished or otherwise disposed of or kept in violation of the provisions of this act, such justice of the peace or judge shall, with or without the approval of the prosecuting attorney, issue a warrant directed to any law enforcement officer of the state, commanding him to search the premises designated and described in such complaint and warrant, and to seize all controlled substances there found, together with the vessels in which they are contained, and all implements, furniture and fixtures used or kept for the illegal manufacture, sale, barter, exchange, administering, dispensing, delivering, distributing, producing, possessing, giving away, furnishing or otherwise disposing of such controlled substances, and to safely keep the same, and to make a return of said warrant within three days, showing all acts and things done thereunder, with a particular statement of all articles seized and the name of the person or persons in whose possession the same were found, if any, and if no person be found in the possession of said articles, the returns shall so state. The provisions of RCW 10.31.030 as now or hereafter amended shall apply to actions taken pursuant to this act.

## STATEMENT OF THE CASE

This Petition seeks review of James Smith's felony conviction for possession of marijuana in his own home for his own use.

1. The "crime" occurred on October 15, 1976: as Jim and Donna Smith and their family were sitting down to dinner, four Snohomish County Sheriff's officers knocked at their door. RP 36-8.[3] The officers had a search warrant, based on an affidavit saying a "concerned citizen" had "observed what the citizen believed to be marijuana growing in one of the greenhouses"[4] at the Smith residence, and had "obtained a sample of the suspected marijuana and brought said sample to Sgt. Nelson (SCSO)". Warrant Affidavit, Exhibit 9.

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[3] Throughout this Petition, citations to the Reporter's Transcript of Testimony at trial are preceded by "RP"; citations to the Clerk's Papers are preceded by "CP".

[4] There were two small greenhouses at the Smith residence: one inside the garage connected to the house, and one just behind it. RP 6, 38. Both were closed and invisible from off the property, and contained a variety of plants. RP 39, 57.

The officers ordered the Smith family into the living room, and held them there while the house was searched. RP 4, 38. The search lasted roughly an hour and a half (RP 31), and penetrated every compartment of the Smith's home--including their bed, bedroom and private papers (RP 19-20). As the trial court found, "from the perspective of the Smith family, the search was a complete ransacking." Mem. Decision at 2, App. B12. According to the officers it was "standard operating procedure" in such cases. RP 29.

The officers found a bundle of half-grown marijuana plants, two plastic baggies of marijuana leaves and some marijuana seeds --a total of some ten ounces of usable marijuana. RP 16. For possession of that substance, a felony under RCW 69.50.401(c), they placed Jim Smith under arrest and took him off to jail. RP 72.

2. The trial on the charge was brief; the facts were undisputed. Jim Smith testified the marijuana was his and that he had intended "to smoke it" (RP 40), as he had done for two years--since his wife gave him "an ultimatum to quit drinking or she was going to divorce me, plain and simple." RP 69.[5]

> "Mr. Smith had found that his anxieties and tensions were only aggravated by his former use of alcohol, and that the substitution of marijuana had not only helped these problems, but had significantly improved his relationships within his family."

Mem. Decision 1, App. B2. The prosecutor disclaimed any issue of intent: "he is charged with possession, not possession with intent to deliver or manufacture;" "[w]e are not charging him with possession with intent to deliver." RP 48, 50.

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[5] Jim testified he grew his own marijuana for two reasons: "there's no chemicals. I didn't particularly want people who do deal in drugs around my children." RP 43.

The sole defense claim was that the felony prohibition of marijuana possession, as enforced against private possession by an adult in his own home, was unconstitutional. RP 76; Motion to Dismiss, CP 134.

3. The hearing on the Motion to Dismiss was joined with the trial of the facts of the case.[6] In it both sides submitted some nineteen volumes of documentary materials[7] and called witnesses to testify, regarding the effects of marijuana use. The witnesses included both "nationally

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[6] The trial was continued a month so that the state could compile all its evidence and secure its witnesses. CP 75.

[7] The documentary materials--including scientific papers, governmental commission reports, and books regarding the history and effects of marijuana use--are listed in State v. Smith, supra, 93 Wn.2d at 358-9 (Dolliver, J., dissenting), App. A.

recognized experts,"[8] and field professionals[9] who testified to their experiences with and studies of the effects of the drug. There was little dispute among the witnesses

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[8] Mem. Decision 2, App. B3. The defense called four experts: Dr. Alan Marlatt, a psychologist, and Dr. Lawrence Halpern, a neuropsychopharmacologist, both from the University of Washington; Dr. Joel Fort, a psychiatrist long specializing in drug abuse problems; and Dr. Thomas Ungerlieder, a psychiatrist and a Commissioner on the National Commission on Marihuana and Drug Abuse. The State called two experts: Dr. Reese Jones, a pharmacologist, psychiatrist, and consultant to the National Institute on Drug Abuse; and Dr. Gabriel Nahas, a physiologist from Columbia University.

[9] The defense called two public health professionals from the City of Seattle, where marijuana possession is not a crime--Arthur Simmons, Director of the Center for Addiction Services, and Fred Gianolla, head of the King County Jail paramedical program --both of whom testified their agencies' records contained no cases of marijuana-related health or drug problems. RP 578-579, 1045-1050. It also called Dr. Brian Ford, who conducted an Air Force study of American military personnel in Spain which found no medical or social problems associated with marijuana use. RP 589, 600-601. The prosecution called Washington State Trooper F. B. Walser, who testified that he had encountered "several instances" of "erratic driving" where he "suspected the driver was high on marijuana" (RP 976-7), and Brent Ebinger, a former drug addict, who said that he had used marijuana and had committed crimes "for drugs, and for, you know, to live." RP 800.

on any relevant subject.[10]

4. The trial court's decision came after it took the case under advisement for a month. It reflected the overwhelming weight of the evidence. Primarily focusing on the defense claim of the right to privacy in the home--which it said required that any intrusion have a "fair and substantial relationship" to a governmental interest in "the health, morals, education and welfare of the people," Mem. Decision at 5, App.B9--it examined, and rejected, each of the arguments that had historically been made in

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[10] The major difference between the State and defense experts regarded the certainty with which the studies to date had ruled out various possible adverse health consequences of long-term, heavy marijuana use. Even on this, the parameters of the difference were fairly narrow. None of the witnesses disagreed significantly with Dr. Jones, the State's principal expert: "it's hard to think of a drug that is harmless completely in all situations." RP 401. "I view tobacco and nicotine as exceedingly toxic substances. Its hard for me to conceive that marijuana would be much worse." RP 420. "There's more known dangers to alcohol, you know, [than marijuana]; no question about that." RP 458.

support of the marijuana prohibition:[11]

> "[T]here is not an addictive quality, and even psychological dependence is very unusual. The rare case of anything related to withdrawal symptoms seems to occur with only extremely heavy usage, and even then moderate irritability seems to be the only apparent symptom.
>
> The 'stepping stone' theory as a characteristic of marijuana use simply is not true. There is no evidence that marijuana leads one on to the use of other drugs. No cause and effect relationship exists. . . .
>
> Marijuana does not make the user more violent and aggressive. To the contrary, the effect of marijuana intoxication is to relax and make one less aggressive.
>
> No evidence has been developed to substantiate the frequently stated belief that marijuana causes an increase in criminal activity of any kind, much less violent crime . . . ."

App. B11-12.

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[11] "[T]he rationale for the criminalization of marijuana has shifted over time." United States v. Kiffer, 477 F.2d 349, 354 (2d Cir.) cert. denied 414 U.S. 831 (1973). The history of these shifts is comprehensively reviewed in Bonnie and Whitebread, The Forbidden Fruit and the Tree of Knowledge: An History of the American Marijuana Prohibition, 56 VIRGINIA L. REV. 971 (1970). Courts have uniformly found the original arguments for the marijuana laws "medically insufficient, if not absurd." People v. Summit, 517 P.2d 850, 853 (Colo. 1974).

The court then discussed the evidence regarding the long-term health consequences of marijuana use, noting first that

> "Despite exhaustive research by the medical profession in this country and abroad in recent years, and observations of entire cultures of marijuana smokers over generations around the world, there does not appear to be a single documented case of permanent physiological or psychological harm from this drug."

App. B10. The court made it clear this did not mean the drug was totally harmless however used:[12]

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[12] The court also noted that "contrary" conclusions on the health issues had been reached by Senator James Eastland in the HEARING BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 93rd CONG. 2nd SESS., "Marijuana-Hashish Epidemic and Its Impact on United States Security", xi-xii, one of the documents the State put into evidence. Mem. Decision at 9-12, App. B19-24. In his introduction to these hearings--which he said were one-sided because they were called "to present the 'other side' of the story," id. at xv--Senator Eastland pointed to an "array of frightening social consequences, or possible consequences" of marijuana use. Id. at xi. Senator Eastland also noted that "the scientists who testified before the Subcommittee were unanimous on the point that it made no sense to send young people to prison for simple possession of a few joints of marijuana." Id. at xvi.

> "Although it may be safe to say that moderate or even moderately heavy use of marijuana has not been shown to be harmful to the human organism, that is not the same thing as saying that science may not soon show that it does cause harm as studies and research techniques improve. . . . Already, reputable scientists are convinced that the burning vegetable matter of which marijuana is composed will be shown to be cancer producing in much the same way as tobacco. . . ."

App. B10. But it concluded that

> "the known or suspected harm from marijuana would seem to provide an inadequate foundation on which to base a felony statute. The remote prospect of some future harm does not seem to constitute a fair and substantial basis for such an enactment. If the statute is to stand, its justification must be found in the acute or immediate effect of the drug . . . ."

App. B15-16.

The court then found a purpose for the marijuana prohibition unique in fifty years of arguments over the subject, in the nature of marijuana intoxication itself.[13] It

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[13] Because neither side had claimed it was an issue, there was little testimony on what marijuana intoxication was like. Dr. Jones, the State's expert, did describe it in passing thus: "the most common effect is . . . a relaxed, mixed relaxed, stimulated, perceptually sharp mood state; time sense altered, you know, a very pleasurable state." RP 386.

discounted "hallucinations and panic anxiety reactions to marijuana intoxication" as "extremely rare phenomena" cured by "discontinuance and reassurance." App. B16. But it said:

> "Marijuana does interfere with the orderly processes of the mind. The sense of time is modified somewhat by the relaxing effect of the drug, and complex reasoning is interfered with, as is the ability to concentrate effectively. Carefully controlled experiments have not explained just how the learning process is affected, but there is reliable evidence that information acquired during intoxication is not stored efficiently in the memory centers of the brain. The intangible known as 'incentive' is depressed while under the influence, and motor mechanical coordination is significantly impaired. Detailed and carefully controlled studies now establish that the operation of motor vehicles while under the influence produces a significantly greater number of automobile accidents, including fatalities, than is the case with non-users. Airplane pilots, in simulator studies, made substantially greater errors in judgment while under the influence of marijuana, and some errors persisted for six hours after use."

App. B17-18. Without further elaborating on how these effects, in private use, related to any State interest, the court declared these were were "matters clearly affecting

the health, education and welfare of the people of the state" and that justified the criminal prohibition of marijuana. App. B27.

Rejection of the other defense arguments followed in train: though the court acknowledged that the defense claim that other, legal substances were more harmful "would appear to be true," it said this did not "compel a conclusion" the laws against marijuana denied Equal Protection; and because it found a "fair and substantial" basis for the law, it held the felony punishment it carried was not cruel and unusual. App. B26-27.

The court accordingly entered a finding of guilt (App. B27-28), and later sentenced Jim Smith to five years imprisonment, deferred on condition of probation and a $500 fine. CP 6-7.

5. The appeal went directly to the Supreme Court of Washington, and was joined with that of two other cases raising similar issues. State v. Smith, 93 Wn.2d 329 (1980), App. A. After extensive briefing,[14] and argument and reargument of the case, that Court affirmed by a sharply divided vote. Ibid. Both the majority and dissenting Justices accepted the factual findings of the trial court, id. at 338 (majority opinion), 359-362 (Dolliver, J., dissenting) --but considered them relevant to different issues.

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[14] While the appeal was pending, petitioner submitted additional authorities indicating that "few new developments have been reported" regarding the human effects of marijuana in the scientific literature since the hearing in this case. MARIHUANA AND HEALTH, Seventh Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare at 2 (1978); see also MARIHUANA AND HEALTH, Eighth Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare at v-vii (1980).

The majority applied the factual findings only to one of the issues raised on appeal--the claim that classification of marijuana as a criminally prohibited substance denied equal protection. Id. at 335-8. To reject that claim, it specifically overrulled its prior holdings that a criminal "classification must rest upon some difference that has a fair and substantial relation to the legislation." Id. at 336n.2. Instead it rejected the equal protection argument because the defense had failed to "show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification," id. at 337--given the trial court's findings and the possibility that "the legislature may well have considered more evidence than was brought before the trial court in this case," id. at 338.[15]

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[15] The record contained an affidavit from the legislative author of RCW Chapter 69.50 which said, "No evidence was taken by the legislature on th[e] specific subject" of whether "marijuana met the criteria for inclusion in Schedule I. . . ." CP 120.

The majority's decision on the privacy issue did not depend on any findings or assumptions of fact. Adopting the rationale of State v. Anderson, 16 Wn.2d 553, 558 P.2d 307 (1976), it said that the sources of "'the right to privacy in the home . . . limit that right to activities involving important or fundamental rights,'" and "'refuse[d] to extend the right of privacy in the home to . . . the possession . . . of marijuana.'" 93 Wn.2d at 348. It thus held that enforcement of the marijuana prohibition against private possession in the home impacted no constitutional right at all, thereby dispensing with the need to find it served any state interest.

Similarly, the majority rejected the argument that the felony punishment of private marijuana possession was constitutionally cruel and unusual, holding that "a deferred sentence of five years and probation of three years, was not grossly disproportionate to the offense." Id. at 329. Four Justices dissented from this last conclusion:[16] they held that imposition of "the status of a convicted felon, to lose the right to vote . . . or hold public office . . . and your 'civil rights' . . . simply for mere possession of over 40 grams of marijuana does not comport with current standards of decency" and "violate[s] both the Eighth Amendment and [Washington] Const. art. 1, §14." Id. at 366-367 (Dolliver, J. dissenting).

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[16] Chief Justice Utter, agreeing that a felony conviction "for possession of marijuana . . . violate[s] federal and state prohibitions on cruel and unusual punishments" did "not reach the equal protection and privacy claims" made in the appeal. Id. at 354.

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Before trial, petitioner moved to dismiss the charge on the ground, inter alia, that the law "making private possession of marijuana in the home a felony" "violates the right to privacy . . . guaranteed by the Fourteenth Amendment to the Constitution of the United States . . . ." CP 134. In support of that Motion he argued that the law against private "possession of marijuana tramples on this right by telling the individual . . . what he may do and possess in the privacy of his own home where no one else is affected--and by sending in agents of the State . . . when it is suspected the State's dictates are not being followed." Prelim. Memo at 7, CP 142. The trial court held that the "legislature is properly concerned with minimizing the impact" of the "euphoric state of intoxication" marijuana creates, and denied the Motion. Memorandum Decision at 14, App. B27.

On appeal to the Washington Supreme Court petitioner argued that, particularly under the Fourth Amendment, "The power of the State to regulate and control its citizens' activities . . . without significant justification clearly ends at the threshhold of the private dwelling." App. Br. 34-5. That Court rejected that argument, holding that "'the right of privacy in the home'" is "'limit[ed] . . . to activities involving important or fundamental rights.'" State v. Smith, supra, 93 Wn.2d at 348.

## REASONS FOR GRANTING THE WRIT

This Petition asks this Court to decide one limited and fundamental issue: whether, under the Fourth Amendment, there is a general right to be free from searches of homes which are "unreasonable" because they are aimed at purely private activity which neither involves nor affects anyone other than the homeowner himself; or whether, as the court below held, the right to privacy in the home is limited, and applies only to activities subject to distinct protection under the Constitution.

That issue arises here in the context of a prosecution for possession of marijuana; but it involves no question of the power of the government to regulate that drug or any other. It questions only the power of the government to enforce its regulations by intrusion into private homes, to interdict purely private behavior which has no moral component and which demonstrably affects no public interest.

Petitioner respectfully submits that, by every measure, it is an issue worthy of this Court's review.

1. The issue is squarely presented here.

The invasion of home privacy in this case was as severe as any such governmental intrusion could be. Acting on a report from a "concerned citizen," State officers penetrated into the most private parts of Jim Smith's house--his marital bedroom and personal papers (RP 19-20)--and then took him from it under arrest (RP 739). This was "standard operating procedure" (RP 29) in the enforcement of this law.

The State made no claim this action served any purpose but to control Jim Smith's purely private behavior. It alleged no implications of his conduct to others than himself, and made it clear it was "not charging him with intent to deliver or manufacture." RP 48.

The trial court held the intrusion was constitutional--though the "crime" it was aimed at posed no danger to others--finding a state interest in protecting "the health, education and welfare of the people" by prohibiting them from temporarily altering their "learning, incentive, efficiency, and motor coordination" by using marijuana, even in private. See page 16, above. The Washington Supreme Court held the intrusion required no justification, because "'the right to privacy in the home'" is "'limited . . . to activities involving important or fundamental rights.'" See page 22, above.

Those decisions, and the facts of this case, squarely present the issue raised here.

2. The issue is fundamental.

The idea of a distinct right of privacy in the home is hardly of modern origin. An "overriding respect for the sanctity of the home...has been embdeded in our traditions since the origins of the Republic." Payton v. New York, 48 U.S.L.W. 4375, 4383 (U.S., April 15, 1980).

> "The zealous and frequent repetition of the adage that 'a man's house is his castle,' made it abundantly clear that both in England and the colonies the 'freedom of one's house' was one of the most vital elements of English liberty."

Id. at 4381 (footnotes omitted).

The defenses of this freedom that led to its protection in the Fourth Amendment held that the power of the government to enter into homes was, or should be, limited:

> "When Pitt denounced the cider tax and James Otis spoke out against the writs of assistance and Patrick Henry opposed the adoption of the Constitution without a Bill of Rights, they were primarily interested in protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions.

Barratt, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. COURT REV. 46, 71 (1960) (footnotes omitted).

Pitt's defense of the right of the "poorest man . . . in his cottage [to] bid defiance to all the forces of the Crown," which "echoed and re-echoed throughout the Colonies," Payton v. United States, supra, 48 U.S.L.W. 4383 n.54, warned "particularly against the dangerous precedent of admitting officers of the ecise into private houses." LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION 41 (1937). That precedent--even under the plausible guise of enforcement of the taxing power[17]--was a marked expansion of the authority of the government to enter and search homes, which at common law had been limited to

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[17] The tax to which Pitt spoke applied to "'subjects who from the growth of their own orchards, make Cyder and Perry'" and made their "'private houses . . . liable to be searched at pleasure.'" LASSON, supra, at 42. It was later repealed, "coincidental with the resolution of the House of Commons concerning general warrants." Ibid.

"cases of felony."[18] The response to that expansion forged the concept of liberty that later found expression in the Fourth Amendment. LASSON, supra at 40-50.

Part of that concept held the power to search homes should be restricted, not just by proper warrant procedures, but by limiting the occasions where it could be exercised. One of Pitt's proposals to end abusive searches for papers would have explicitly limited the offenses for which any such warrant could issue. Id. at 49. Henry's argument thirty years later for "a bill of rights" to "restrai[n] within proper bounds" the power of the government to "go into your cellars and rooms, and search, ransack, and measure everything you

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[18] Weeks v. United States, 232 U.S. 383, 390 (1914). Of course, among the felonies against which search warrants were most abusively employed in England were crimes of political and religious dissent foreign to our law. See LASSON, supra at 25-32. But by the standard of the time, they were serious public offenses nonetheless.

eat, drink, and wear," 3 ELLIOT, DEBATES 448-9 (1854), clearly called for similarly substantive limitations on that power.

The language of the Fourth Amendment answered that call and clearly prohibited all "unreasonable searches and seizures." That distinct guarantee was first proposed, and later inserted, by Egbert Benson, who argued that though the warrant clause

> "was good as far as it went, it was not sufficient . . . The provision as he proposed it contained two clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment."

LASSON, supra at 103 (original emphasis).

The clear import of that language, and the idea to which it responded, was that the freedom of the home is not limited, but is a general right which yields only to

superceding public interests. James Otis sparked the fight for American liberty with exactly that argument

> "A Man, who is quiet, is as secure in his House, as a Prince in his Castle--notwithstanding all his Debts, & civil processes of any kind.--But for Flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be incrohd on."

Barrett, supra, at 71, quoting Quincy's Mass. Rep. 471 (1865). That is the same argument petitioner relied on below:

> "The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based upon proof that the public health or welfare will in fact suffer if the controls are not applied."

Ravin v. State, 537 P.2d 494, 511 (Alaska 1974). The explicit rejection of that claim by the court below calls into question the very scope and meaning of the Fourth Amendment.

3. The issue is substantial.

This Court has clearly recognized "the Constitution extends special safeguards to the privacy of the home." United States v. Orito, 413 U.S. 139, 142 (1973).

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: 'the right of the people to be secure in their...houses...shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' Silverman v. United States, 365 U.S. 505, 511."

Payton v. New York, supra, 48 U.S.L.W. at 4380.

This Court has twice enforced the Fourth Amendment's ban on entries into homes which are "unreasonable" because they serve no legitimate state interest--in cases which, like this one, criminal prosecutions for private domestic conduct were involved.

Griswold v Connecticut, 381 U.S. 479 (1965) invalidated state laws "forbidding the use of contraceptives rather than regulating their manufacture or sale" because of the intrusions into "the sanctity of the home" they implied. Id. at 484-5 (plurality opinion). Stanley v. Georgia, 394 U.S. 557 (1969), similarly held that criminal laws against obscenity could not "reach into the privacy of one's own home" because the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," and because there was "little empirical basis" for any contention that the private perusal of obscene matter led to public anti-social behavior. Id. at 565-7.

These cases seem to embody "a reaffirmation that 'a man's home is his castle.'"[19]

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[19] Paris Adult Theater No. 1 v. Slaton, 413 U.S. 49, 69 (1973). If "obscene material has no protection under the First Amendment," id. at 66, Stanley can only be read as a privacy case. Ibid.

They speak of "myriad activities that may lawfully be conducted within the privacy of the home, but may be prohibited in public." United States v. Orito, supra, 413 U.S. at 142. They say that, at least in the home, "the right to be let alone" is "the most comprehensive of rights." Olmstead v United States, 277 U.S 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis).

This petition asks whether that is what these cases mean--whether the right to be let alone in the home protects even actions possibly foolish or unhealthy which affect no one else.[20] It is a question this Court has not previously addressed, and one worthy of its review.

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[20] See Application of the President and Directors of Georgetown Hospital, 331 F.2d 1010, 1017 (D.C.Cir. 1964), cert. denied 377 U.S. 978 (1964) (dissenting opinion of Judge Burger); cf. Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

4. This Court has not decided the issue.

No previous decision of this Court has clearly determined if the right to privacy in the home encompasses private acts in that setting which--like possession of marijuana--have no special claim to constitutional protection, but which impact no cognizable state interest.[21] Nor has it

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[21] Certainly, this Court has never decided whether the constitution permits the enforcement of laws against private marijuana possession in the home. Its two decisions on the merits of challenges to marijuana prohibitions understandably found without substance a privacy claim in a case involving marijuana sale, Boraas v. State, 229 So.2d 244, 246 (Fla. 1969), appeal dismissed 400 U.S. 800 (1970), and a contention that marijuana use is a protected religious practice, Gaskin v. State, 490 S.W.2d 521, appeal dismissed 414 U.S. 886 (1973). Only three previous applications for certiorari petitioner has found have raised this issue: one in an injuncation action, Louisiana NORML v. Guste, 300 F.Supp. 404 (E.D.La. 1974) aff'd 511 F.2d 1400 (5th Cir.) cert. denied 423 U.S. 867 (1975), and two decided below partly on procedural grounds, State v. Kantner, 53 Hawaii 327, 493 P.2d 306, cert. denied 409 U.S. 948 (1972); Cavanass v. State, 581 P.2d 475, 478, (Ok.Cr.App. 1978), cert. denied 439 U.S. 1117 (1979).

indicated such acts somehow fall outside the scope of that right.

This Court has twice said, in dicta, that among the "very limited circumstances" which justify exceptions from the "right to be free . . . from unwanted governmental intrusions into one's privacy," Stanley v. Georgia, supra, 394 U.S. at 546, are those involving the use of drugs which have clear public consequences. Even in the home, "possession of . . . narcotics" may not be entitled to privacy protection, id. at 568n.11, because of the decidedly public "problem of the addict . . . [who] will commit crimes, if necessary, to obtain his drug." State v. Zornes, 78 Wn.2d 9, 19n.5, 475 P.2d 109 (1970). But marijuana "is not . . . a narcotic drug" id. at 16, as "its use does not lead to addiction" or "create the problems of addiction." Id. at 19. Nor is there any evidence, or any claim or finding here, that "idleness, disorder,

pauperism, and crime. . . are traceable to" marijuana use. Compare Mugler v. Kansas, 123 U.S. 623, 662 (1887).

Acknowledgement of the state's power to enter homes to interdict the use of drugs which create those kinds of social problems does not answer the question here. Nor is the validity of state laws prohibiting "'traditional offenses against good morals'"[22]-- a "difficult question" which "the Court has not definitively answered," Carey v. Population Services Int'l, 431 U.S. 678, 694n.17 (1977)--any part of the issue in this case. Laws against drug use have neither religious nor common law roots, see FREEMAN, NARCOTICS CASES: PROSECUTION AND DEFENSE 76 (1970), and have no "moral" content: "Possession of a

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[22] Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), affirmed 425 U.S. 901 (1976), quoting Poe v. Ullman, 367 U.S. 497, 552 (1961) (dissenting opinion of Mr. Justice Harlan).

natural growing plant can hardly be malum in se." People v Sinclair, 357 Mich. 91, 194 N.W.2d 878, 905 (1972) (Brennan, J.).

Private marijuana possession is in no category of acts this Court has declared subject to state control in the home. It is neither more nor less entitled to constitutional protection than anything else. Its only distinguishing feature, as the court below found, is that it involves an intoxicant. Whether that fact is enough to justify state entry into a home,[23] or what is enough, are questions to which this Court has not finally spoken. Compare Powell v. Texas, 392 U.S. 514, 533 (1968).

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[23] The trial court's assertion of a state interest in prohibiting the "state of intoxication" caused by marijuana itself approaches an endorsement of governmental "power to control men's minds" against which "our whole constitutional heritage rebels." Stanley v. Georgia, supra, 394 U.S. at 565. The government of Iran lately outlawed broadcast music for much the same reason the trial court used: it "stupifies persons . . . and makes their brains inactive and frivolous." The New York Times, July 24, 1979 1:1.

5. Lower courts have divided on the issue.

The decision of the court below is consistent with those of most other courts which have confronted the issue presented here in cases involving private marijuana possession in the home.[24] But at least one state Supreme Court has reached a directly contrary result.

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[24] Relatively few constitutional challenges to marijuana laws have involved private possession and claims based on the right of privacy in the home. The vast majority of such challenges have come in importation, sale, conspiracy to sell, possession with intent to sell, or other plainly commercial activities. See Soler, Of Cannibis and the Courts, 6 CONN. L. REV.601 (1974) and cases there cited; see also, e.g., United States v. Rodriguez-Camacho, 468 F.2d 1220 (9th Cir.), cert. denied 410 U.S. 984 (1972); State v. Rao, 370 A.2d 1310 (Conn. 1976); State v. Liens, 234 N.W.2d 645 (Iowa 1975); State v. Donovan, 344 A.2d 401 (Me. 1975); State v. Mitchell, 563 S.W.2d 18 (Mo.1978); Evans v. State, 569 P.2d 503 (Ok.Cr.1977); State v. Strong 245 N.W.2d 277 (S.D.1976). None of these cases are in point here, because of the basic difference "between legislation which seeks to regulate economic and social relationships and that which intrudes into the purely private sphere of human life." State v. Kantner, supra, 493 P.2d at 317-8 (Abe, J.). See United States v. Orito, supra; compare Ravin v. State, 537 P.2d 494 (Alaska 1975), with Belgard v. State, 543 P.2d 206 (Alaska 1975).

A unanimous court in Ravin v. State, 537 P.2d 494 (Alaska 1975) held that--because "the home carries with it associations and meanings which make it particularly important as a situs of privacy" protected "under both the federal and Alaska constitutions," and because no "close and substantial relationship between the public welfare and control of . . . possession of marijuana in the home for personal use" could be shown--the enforcement of laws against private marijuana possession in the home is unconstitutional. Id. at 504. In State v. Kantner, supra, 493 P.2d at 306, three of five Justices reached similar conclusions[25]--but because one of them

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[25] See id. at 312-3 (Abe, J.) ("that marijuana is harmful to the user does not authorize the State under its police power to prohibit its use"), 315 (Levinson, J.) ("the State has failed to establish that the private, personal use of marihuana harms either the user or society"), 320 (Kobayashi, J.) ("the harm created by placing a criminal sanction on the activity of a significant percentage of our population . . . far outweighs any present benefit to be derived from the effects of classifying marihuana as a narcotic.").

found the issue improperly preserved in the trial court, id. at 311 (Abe, J.), a majority voted to uphold the conviction.

Other courts have rejected such privacy challenges. Several have done so in the context of civil actions to enjoin the enforcement of such marijuana laws, which they understandably saw as asking the "court to substitute its judgment . . . for that of the respective legislatures."[26] But several others have upheld criminal convictions[27] for private possession of marijuana in the home against privacy

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[26] Louisiana NORML v. Guste, supra, 380 F. Supp. at 408; see also NORML v. Bell, ___ F. Supp. ___, 26 Cr. L. 2505 (D.C.D.C. Feb. 11, 1980); Illinois NORML v. Scott, 66 Ill. App. 3d 633, 383 N.E.2d 1330 (1978); Marcaux v. Attorney General, ___ Mass. ___, 375 N.E.2d 688 (1978).

[27] Significantly, two recent cases have upheld police entries into homes on which marijuana prosecutions were based, on the explicitly limited ground that the entries were made for another legitimate purpose. Cavanass v. State, supra, 581 P.2d at 478; Zander v. District Court, 591 P.2d 656, 594 P.2d 273 (Mont. 1979).

challenges--either simply deferring to the legislative decision to prohibit the substance,[28] or holding, as the court did here, that the right of privacy did not "extend" to the possession of marijuana.[29]

Thus, though there is a split among the lower courts on this issue, the conflict is not wide. But it is deep: individual Justices writing separately have protested the decisions in the most vehement terms:

> "[T]he real purpose of the criminalization of the possession of marijuana is simply to perpetuate society's . . . prejudice against marijuana . . . . Clearly, the only confirmed harm of marijuana is, not in marijuana per se, but the laws which criminalize the possessor.

State v. Baker, supra, 535 P.2d at 1405 (Kobayashi, J., dissenting).

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[28] See State v. Baker, 535 P.2d 1394 (Hawaii 1975); State v. Kincaid, 98 Idaho 440, 566 P.2d 763 (1977); State v. Kells, 199 Neb. 374, 259 N.W.2d 19 (1977).

[29] State v. Murphy, 117 Ariz. 57, 570 P.2d 1070 (1977); State v. Chrisman, 364 So.2d 908 (La. 1978); State v. Shepard, N.Y.2d ___, ___ N.E.2d ___ (June 6, 1980).

> "Too often we want protection for what 'we' do in the privacy of 'our' homes but not for what 'they' do in the privacy of 'their' homes."

Zander v. District Court, supra, 594 P.2d at 297 (Shea, J., concurring in part).

> "'Big Brother' cannot, in the name of public health, dictate to anyone what he can eat or drink or smoke in the privacy of his own home."

People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878, 896 (Kavanagh, J., concurring).

Though the direct conflict here is with only one other State's highest court, its remarkable result is that people like Jim Smith are subject to felony conviction for acts which, across the state line, are held protected by the federal constitution.[30] That, and the conflicting voices of the judges who have spoken out on this issue, further underscore the importance of this Court's review here.

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[30] It is worth noting again in this context that--neither in Alaska nor in the jurisdictions which have legislatively removed criminal penalties for private marijuana possession--have adverse social consequences been reported. See MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES (National Governors Conf. 1977); note 9, above.

6. The issue is of extraordinary importance

Literally millions of American homes are subject to the kind of intrusion the Smith family suffered in this case. As of four years ago, marijuana was "smoked regularly by nearly fifteen million Americans; probably in excess of thirty million citizens ha[d] tried it."[31] Any law which penetrates so far into so many lives is clearly a matter of major constitutional concern.

But the greatest constitutional cost of the enforcement of these laws is not the present jeopardy of police intrusion into these person's homes--nor the disruption of the judicial process which their arrests cause or the disrespect for the rule of law

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[31] State v. Smith, supra at 93 Wn.2d 354 (Dolliver, J., dissenting). These numbers appear to have increased, perhaps substantially, since 1976. MARIJUANA AND HEALTH, Eighth Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare at 2 (March 1980).

it creates.[32] The greatest damage done to the Constitution by the marijuana laws lies in the legacy of decisions like the one below. When the fears that led to the marijuana laws are forgotten and the recommendations of all the Commissions become law; when the use of marijuana is no longer seen to be rebellious or stylish, but as the relatively harmless self-indulgence it is; those decisions will stand if this Court lets them. Under the precedent they set, the home will be a refuge only for activities to which legislatures and courts, by fiat, say the right of privacy "extends." That precedent will be ready for the next wave of social reformers who decide what is best for the "health, education and welfare" of others, in a technological age where no refuge will be conceivable if there is none in the home.

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[32] These costs are not insignificant. See, e.g., NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 144-5 (1972); KAPLAN, MARIJUANA--THE NEW PROHIBITION 36-7 (1971)

Before these precedents are implanted more deeply into our law, this Court should decide whether they are consistent with what the Constitution means.

## CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A:
# DECISION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

[Nos. 45296, 44890, 44597. En Banc. April 24, 1980.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES H. SMITH, *Appellant*.

THE STATE OF WASHINGTON, *Respondent*, v. DAVID L. ANDERSON, *Petitioner*.

THE STATE OF WASHINGTON, *Respondent*, v. DAVID J. REDWINE, ET AL, *Appellants*.

[1] **Constitutional Law — Equal Protection — Classifications — Test — Rational Relationship.** The rational relationship test for determining the validity of statutory classifications challenged on equal protection grounds is applied whenever the legislation does not infringe upon fundamental rights or create a suspect classification. The party challenging the classifications has the burden of proving beyond a reasonable doubt that no state of facts could reasonably be conceived which shows a rational relationship between the classifications and a legitimate governmental objective. Courts will not consider the wisdom of the classifications or changes in public opinion.

[2] **Controlled Substances — Possession — Penalties — Power of Legislature.** Once the legislature has reasonably determined that a drug is dangerous, it has broad discretion in prescribing criminal penalties for its possession.

[3] **Controlled Substances — Marijuana — Possession or Delivery — Equal Protection.** RCW 69.50.401(a) and former (c) (now (d)), which prescribe criminal penalties for possession and delivery of marijuana, are rationally related to the protection of public health and safety and do not violate equal protection guaranties.

[4] **Constitutional Law — Equal Protection — Scope of Regulation.** A statute does not violate equal protection merely because it does not regulate all of the evils perceived by the legislature.

[5] **Criminal Law — Punishment — Cruel and Unusual Punishment — Presumption of Validity.** In determining whether a criminal penalty violates the prohibition against cruel and unusual punishment, a court will presume the validity of the legislative determination and will not invalidate a penalty merely because it believes that a less severe penalty would adequately serve the ends of public policy.

[6] **Criminal Law — Punishment — Cruel and Unusual Punishment — What Constitutes.** A criminal penalty is grossly disproportionate to the offense so as to constitute cruel and unusual punishment only if the conduct should never be proscribed or the punishment is clearly arbitrary and shocking to the sense of justice.

[7] **Controlled Substances — Marijuana — Possession — Cruel and Unusual Punishment.** A defendant convicted of possessing more than 40 grams of marijuana under former RCW 69.50.401(c) (now(d)) is not subjected to cruel and unusual punishment by virtue of the classification of the crime as a felony or by the imposition of a deferred sentence appropriate to a felony.

[8] **Controlled Substances — Marijuana — Possession or Delivery — Right to Privacy.** The prohibition of RCW 69.50-.401 against possession and delivery of marijuana does not interfere with any fundamental right. The constitutional right to privacy in the home does not encompass a right to possess or deliver marijuana for personal use in one's home.

[9] **Criminal Law — Entrapment — What Constitutes.** Entrapment occurs when the criminal design originates in the mind of the law enforcement official rather than the accused and the accused is lured or induced into committing a crime which he otherwise had no intention of committing. When considering an entrapment defense, the trier of fact need not weigh public policy factors or the good faith of the law enforcement official.

[10] **Criminal Law — Subterfuge — Due Process.** A police officer's use of subterfuge does not violate a defendant's due process rights unless his conduct is so shocking as to violate fundamental fairness.

[11] **Searches and Seizures — Warrant — Underlying Evidence — Sufficiency.** A magistrate may properly exercise his discretion to issue a search warrant if his consideration of all the facts and circumstances sworn to as well as the reliability of any informant leaves him with good reason to believe that criminal activity has occurred.

[12] **Criminal Law — Punishment — Discretion of Court — Review.** The imposition of a criminal sentence constitutes an abuse of discretion only if the reviewing court can say that no reasonable person would take the view adopted by the trial court.

UTTER, C.J., and DOLLIVER, HICKS, and WILLIAMS, JJ., dissent in part by separate opinions.

**Nature of Action:** Separate prosecutions for marijuana related offenses. Defendant Anderson was charged with delivery of marijuana and possession of less than 40 grams of marijuana. Defendants Redwine and Smith were charged with possessing over 40 grams of marijuana.

**Superior Court:** Defendant Anderson was convicted in the Superior Court for Cowlitz County, No. 5075, Frank L. Price, J., on January 17, 1975. Defendants Redwine were convicted in the Superior Court for Grant County, No. 3855, B. J. McLean, J., on December 19, 1975. Defendant Smith was convicted in the Superior Court for Snohomish County, No. 8418, John E. Rutter, Jr., J., on January 12, 1978.

**Court of Appeals:** The court *affirmed* the conviction of defendant Anderson at 16 Wn. App. 553, holding that his right to privacy in his home did not extend to the possession or delivery of marijuana.

**Supreme Court:** Holding that the criminal penalties for possessing and delivering marijuana prescribed by RCW 69.50.401 do not violate equal protection of the law or the right to privacy or constitute cruel and unusual punishment, and that the lower courts had made no errors in giving instructions, imposing sentences, and issuing a search warrant, the court *affirms* the judgments.

*Clifford R. Kuhn, Don L. McCulloch,* and *Roethler & McCulloch,* for petitioner Anderson.

*Ries & Kenison,* by *Jerry J. Moberg,* for appellants Redwine.

*Smith, Kaplan, Withey, Theiler & Sowa* and *Daniel Hoyt Smith (Timothy K. Ford* of American Civil Liberties Union of Washington and the National Organization for the Reform of Marijuana Laws), for appellant Smith.

*Robert E. Schillberg, Prosecuting Attorney for Snohomish County, David G. Metcalf* and *Carl K. Chen, Deputies, Paul Klasen, Prosecuting Attorney for Grant*

*County*, and *James A. Whitaker, Deputy, Henry R. Dunn, Prosecuting Attorney for Cowlitz County*, and *James E. Warme, Deputy*, for respondent.

*Robert H. Aronson* on behalf of University of Washington Appellate Advocacy Program, amicus curiae.

ROSELLINI, J.—This is a consolidated appeal of four individual criminal convictions. Each of the defendants was convicted of a violation of the Uniform Controlled Substances Act, RCW 69.50. We consolidated the appeals to facilitate the resolution of issues which raise constitutional challenges to the statutory prohibitions. We affirm the convictions.

Petitioner Anderson was convicted in Cowlitz County Superior Court of violation of RCW 69.50.401(a), the proof showing that he gave a small amount of marijuana to a police agent. In addition, he was convicted of a misdemeanor, possession of marijuana in a quantity less than 40 grams. Division Two of the Court of Appeals affirmed the convictions in a published opinion. *State v. Anderson*, 16 Wn. App. 553, 558 P.2d 307 (1976). This court granted a petition for review.

The appellants Redwine and Smith were respectively convicted in Grant and Snohomish County Superior Courts for violations of RCW 69.50.401(c), punishing the felonious possession of over 40 grams of marijuana. The activity upon which their convictions are factually based was confined to areas in and around their private residences. None of these parties disputes the sufficiency of the evidence to establish possession or delivery of marijuana. Rather, they argue that in light of the locus of the crimes and current information regarding marijuana, their convictions are constitutionally infirm.

These parties, referred to herein as the defendants, join in two constitutional challenges. They argue that the statutory scheme prohibiting marijuana delivery or possession

bears no fair and substantial relation to legitimate governmental objectives and thus violates equal protection guaranties; and that their constitutional right to privacy protects marijuana possession and use within the home, because the State has shown no substantial reason for the regulation. The defendant Smith adds a contention that the punishment prescribed for possession is cruel and unusual. These constitutional challenges are framed against the trial record of defendant Smith. We will precede our discussion of the constitutional issues by reviewing this record which defendants assert establishes the unconstitutionality of the challenged statutory scheme.

The record upon which defendants rely contains the testimony of several expert witnesses. In addition, it contains the testimony of a former drug addict, as well as the testimony of a police officer. The record establishes that marijuana, like alcohol, when ingested into the human body, produces physiological and psychological effects. The chief active ingredient in marijuana, and the one largely responsible for its effects, is called tetrahydrocannabiniol (THC). The level of THC in samples of marijuana varies, and this variation accounts in part for the differences in human reactions to the drug. There is no way of predicting how much THC will be found in a given quantity of marijuana, since it is a plant—a collection of substances easily subject to change.

There is little question, under the evidence, that once a threshold dose of THC, as in marijuana, is ingested by a person, it will produce a euphoric state of intoxication. In addition to this state, there is accompanying distortion of the person's sensory perceptions. The record reflects that use of marijuana impairs an individual's motor coordination, learning ability, and motivation.

Expert witnesses also informed the trial judge that there are other frequently recognized and often debated effects of marijuana. These include effects on: (1) chromosomes, (2) the endocrine system, (3) testosterone (a hormone), and

(4) the formation of deoxyribonucleic acid (DNA) (the substance of which genes are composed).

There is evidence that marijuana may cause deleterious effects not caused by alcohol. Thymidine is a chemical which is the building block of DNA. The testimony indicates that marijuana may affect the incorporation of thymidine into DNA, whereas alcohol does not. Further, THC is not degraded in the body in the same way that alcohol is. A dose of THC may remain in the body up to 8 days.

Scientific findings respecting marijuana effects are not settled. One expert said that chromosome studies are "at variance with each other". Another expert, remarking on the difficulty of experimentation and documentation in the area of marijuana effects stated candidly: "It is not something you get a quick answer to."

This is amply demonstrated by the divergent results of studies. For example, in one experimental study commented upon by an expert witness, evidence of brain atrophy was found in marijuana users. Yet, in another study which utilized a different measurement technique, no evidence of atrophy was found. This divergence led an expert to state that with regard to marijuana's effects: "There is generally legitimate debate amongst people I have a great deal of respect for."

The defendant's record does not seem to resolve this debate. Rather, from it, we, like the trial judge, learn that the long term effects of marijuana are not fully known. This is partially because studies have been limited. For example, the Food and Drug Administration prohibits the use of women subjects. Thus, it will be at least a generation before fetal effects may be fully explored. There has been little study of the effects on children.

The trial judge ruled that in light of present uncertainty with respect to the effects of marijuana, the legislature could classify marijuana as a drug with potential for abuse. He concluded that the defendant had not sustained his

burden of proving the act unconstitutional. We are convinced the trial judge carefully, correctly held that the burden of proof was not met.

While defendants do not contend that they have a constitutional right to possess marijuana, they urge that we independently review the record and their arguments. *See State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978); and *State v. Byers*, 85 Wn.2d 783, 539 P.2d 833 (1975). We have reviewed that record, but we are not permitted to ignore or question the credibility of the testimony of the State's witnesses or disregard the unresolved debate regarding marijuana's effects, as the defendants would have us do. With this in mind, we now turn to the constitutional challenges.

I

Defendants challenge the constitutionality of RCW 69.50.401(a) and (c) on equal protection grounds.[1] They assert that prohibition of marijuana bears no fair and substantial relation to a legitimate state interest.

At the outset of any equal protection analysis it is necessary to define the standard of review against which to test the challenged legislation. In this case, the designation of the appropriate test is important since defendants' argument is that marijuana prohibition must bear a fair and substantial relation to a legitimate state objective.

[1] Two tests are used to judicially measure classifications alleged to violate equal protection: the strict scrutiny test and the rational relation test. *Nielsen v. Washington*

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[1] "(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401(a).

"(c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (d) of this section." RCW 69.50.401(c) (now RCW 69.50.401(d)).

*State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). The former is applied whenever a legislative classification involves a fundamental right or creates a suspect classification. *Nielsen v. Washington State Bar Ass'n, supra; Graham v. Richardson*, 403 U.S. 365, 371–72, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).

The latter, the rational relation test, despite contrary dicta appearing from time to time in our cases, is used whenever legislation does not infringe upon fundamental rights or create a suspect classification.[2] *Brewer v. Copeland*, 86 Wn.2d 58, 69 n.8, 542 P.2d 445 (1975); *see State v. Laitinen*, 77 Wn.2d 130, 459 P.2d 789 (1969), and *State v. Ruzicka*, 89 Wn.2d 217, 570 P.2d 1208 (1977).

The statutory prohibition in this case neither creates a suspect classification nor, as defendants readily admit, does it involve a fundamental right. Thus, in considering this equal protection challenge, we will sustain the challenged classification if it is rationally related to a legitimate governmental objective. And, in looking for a rational relation, we may assume the existence of any necessary state of facts which we can reasonably conceive. *State v. Ruzicka, supra; Brewer v. Copeland, supra; Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523,

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[2]Much if not all of defendants' equal protection argument is premised on the faulty assumption that the relationship shown must be more than a mere rational relationship. They consistently argue the statute bears no fair and substantial relation to governmental objectives. These arguments have no merit since, as we have noted, the relationship need only be rational. We have never adopted and used a higher standard in the absence of a suspect class or fundamental right.

In *State v. Martinez*, 85 Wn.2d 671, 680, 538 P.2d 521 (1975), the court invalidated a criminal prohibition on due process vagueness grounds. Thereafter, in dicta, the court suggested that in cases where a penal statute involving possible incarceration was challenged as violative of equal protection, invigorated scrutiny should be applied. *See State v. Martinez, supra* at 682. The essence of "invigorated" scrutiny is that a classification must rest upon some difference that has a *fair and substantial* relation to the legislation. We have not, contrary to defendants' suggestion, adopted this standard. To the extent, however, that *Martinez, Houser v. State*, 85 Wn.2d 803, 540 P.2d 412 (1975), and *Standow v. Spokane*, 88 Wn.2d 624, 564 P.2d 1145 (1977) contain dicta to the contrary, they are expressly overruled.

520 P.2d 162 (1974). In order to defeat the legislation, the defendant must show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and obsolete. *Brewer v. Copeland, supra; State v. Ruzicka, supra.*

In an effort to meet this burden, the defendant Smith compiled a substantial record. If the defendants' view of the facts is correct, marijuana is not as harmful as the legislature believes, and therefore the legislation was perhaps ill advised. But a challenge, however meritorious, which is directed to the wisdom of the statute will not justify a court in finding it unconstitutional. *Washington State School Directors Ass'n v. Department of Labor & Indus.*, 82 Wn.2d 367, 378, 510 P.2d 818 (1973). The legislature represents the people when it determines that a law is necessary, wise, or desirable, and the court is not empowered to substitute its judgment for that of the legislature.

The record also tends to show that public opinion regarding use of marijuana has vacillated and shifted over the years. But a shift in public opinion is not a basis for invalidations of law. *State v. Grabinski*, 33 Wn.2d 603, 206 P.2d 1022 (1949).

[2] There can be no question of the authority of the State, in the exercise of its police power, to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is too firmly established to be called in question. *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962).

The Supreme Court said there that the legislature may impose criminal sanctions upon the possession of narcotics within its borders, and the wisdom of such legislation would not be open to judicial review. While marijuana may not be a narcotic (*see State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970)) or habit forming, if the legislature reasonably has

concluded that it is dangerous, it has a broad discretion in prescribing penalties for its possession.

[3] Our review of the record reveals certain critical facts which show that marijuana presents certain dangers, and that its prohibition is reasonably related to the public health and safety. Marijuana creates a euphoric state of intoxication which impedes learning, incentive, efficiency, and, importantly, motor coordination. There remains a conflict of expert opinions regarding the seriousness of marijuana's effects, and much has yet to be learned. From reading this record, we cannot say that all doubts about the safety of marijuana have been resolved in its favor.

Assuming that the legislature had before it the evidence in this case concerning the known effects of marijuana and the as yet unknown properties of the drug, it could reasonably find that marijuana creates a danger to users and others.

Furthermore, the legislature may well have considered more evidence than was brought before the trial court in this case. We cannot say, therefore, that the adoption of laws imposing criminal penalties was not reasonably indicated to protect the public welfare.

We note that the apparent dangers of marijuana use have been recognized by other courts. Recent judicial opinions, including *Ravin v. State*, 537 P.2d 494 (Alaska 1975), find that in spite of advanced knowledge the suggested dangers are, as yet, rationally based. *See also Marcoux v. Attorney General*, ___ Mass. ___, 375 N.E.2d 688 (1978), *and see Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974); *State v. Kells*, 199 Neb. 374, 259 N.W.2d 19 (1977); *and see People v. Summit*, 183 Colo. 421, 517 P.2d 850 (1974).[3]

In legislating for health, safety and welfare, certain constraints upon individual freedom have traditionally been

[3]The United States Supreme Court recently declined to review a conviction under Virginia law for the possession of marijuana with intent to distribute it. *Moon v. Virginia*, No. 78-63 (U.S. Supreme Court, November 6, 1978). The petitioner in that case urged that the classification of marijuana with hard drugs for punishment purposes is without rational basis and therefore violates due process.

imposed by the State. Often, such constraints protect both society generally and the individual personally from the perceived harm. *See, e.g., State v. Laitinen, supra* (motorcycle helmet law sustained). It is not our proper function to substitute our judgment for that of the legislature with respect to the necessity of these constraints.[4]

[4] We hold the statutory prohibitions against marijuana use are rationally related to the accomplishment of a legitimate governmental objective—public health and safety. As such, they are not violative of equal protection. We also note in ruling on this matter that, contrary to defendants' suggestion, there is no constitutional requirement which dictates that the legislature must be held rigidly to a rule of regulating all or none of the evils it perceives.

> It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

*Silver v. Silver*, 280 U.S. 117, 124, 74 L. Ed. 221, 50 S. Ct. 57, 65 A.L.R. 939 (1929); *see Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, supra. Ravin v. State, supra*, and *State v. Kells, supra*.

II

Next, the defendant Smith raises a contention that his conviction is barred under the eighth amendment to the United States Constitution and Const. art. 1, § 14, both of which forbid the imposition of cruel punishment, the federal constitution also forbidding "unusual" punishment.[5]

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[4]An annotation in 50 A.L.R.3d 1164, 1177 n.18 (1973) reveals that the majority of courts which have entertained equal protection challenges on grounds that marijuana is not a narcotic drug have sustained the challenged laws. After our decision in *State v. Laitinen*, 77 Wn.2d 130, 459 P.2d 789 (1969), the legislature in response to substantial public pressure amended the law, deleting the helmet requirement, thus illustrating the efficacy of this principle. Laws of 1977, 1st Ex. Sess., ch. 355, § 55, p. 1598.

[5]We have in the past accorded these two constitutional standards essentially identical treatment. *See, e.g., State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968);

While this provision is thought to have been designed primarily to prohibit torture and other forms of physical cruelty, as well as the imposition of sentences unauthorized by law, it was held in *Weems v. United States*, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910), that it also prohibits legislation which mandates a punishment which is grossly excessive. In that case, the petitioner had been convicted under a statute of the Philippines which provided a minimum sentence of 12 years for the falsifying of a public record. Also attached to the sentence were a number of onerous "accessories," including the performance of hard and "painful" labor throughout the term, the wearing of a chain at the ankle and wrist; no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation in family council; and after a term in prison, constant surveillance by the criminal magistrate. These "accessories" the court found excessive when inflicted upon one who had committed an offense which might well have harmed no one.

The two dissenters in that case, one of whom was Justice Holmes, did not believe that the constitutional provision was intended to affect the legislative power to determine and apportion punishment, so long as forbidden bodily punishments were not imposed. Nevertheless, the Court has adhered to the majority's interpretation in the ensuing years. Justice White said, in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 313–14, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972):

> Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments

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and *Woods v. Burton*, 8 Wn. App. 13, 503 P.2d 1079 (1972), *review denied*, 81 Wn.2d 1010 (1973).

that the Amendment would bar whether legislatively approved or not.

[5] In *Gregg v. Georgia*, 428 U.S. 153, 175, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), the following, from the concurring opinion of Frankfurter, J., in *Dennis v. United States*, 341 U.S. 494, 525, 95 L. Ed. 1137, 71 S. Ct. 857 (1951), was quoted with approval:

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

The court said:

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

In ascertaining contemporary standards, the court said, the legislative judgment weighs heavily, because the legislature, rather than the courts, is constituted to respond to the will and consequently the moral values of the people, pointing out that the specifications of punishment are peculiarly questions of legislative policy.

The court said that it could not invalidate a category of penalties because it deemed less severe penalties adequate to serve the ends of penology.

The court there upheld a death sentence for armed robbery and murder. On the other hand, in *Coker v. Georgia*, 433 U.S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), it held invalid a death sentence which was imposed, pursuant to

statutory authority, for commission of the crime of rape under aggravating circumstances.

Here, the defendant Smith was given a deferred sentence of 5 years. He was placed on probation for a period of 3 years. He does not claim that this sentence constituted cruel and unusual punishment, and indeed there is no case which has even suggested that a deferred sentence or probation could fall within the constitutional prohibition. Rather, his argument is that the statute makes his crime a felony and that such designation is unwarranted by the seriousness of his offense. The statute does not expressly designate the offense a felony, but rather calls it a "crime." The punishment prescribed is provided in RCW 9A.20.020 for class "C" felonies, and this offense should be regarded as such. Even so, we are shown no authority for the proposition that classification of a person's offense, or the disabilities attached to that classification can, without more, constitute cruel and unusual punishment.

A similar theory was advanced in *Commonwealth v. Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969), where persons charged with possession of marijuana challenged the constitutionality of their indictments. The statute under consideration there, like our statute, provided no minimum penalty. Since the defendants had not been tried, it was not yet determined whether they would be required to serve any sentence or pay any fine. For this reason, the Massachusetts court held that a challenge to the statute upon Eighth Amendment grounds was totally without merit.

In *State v. Fairbanks*, 25 Wn.2d 686, 171 P.2d 845 (1946), where the appellant had been convicted of taking indecent liberties with a female child and sentenced to a term of not more than 20 years, we held that a claim of cruel and unusual punishment could not be considered until his minimum term had been set by the Board of Prison Terms and Paroles. Implicit in all the cases which have come to our attention, with the exception of *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417

(1962),[6] is an acknowledgment that, before these constitutional provisions can be invoked, the defendant must show that the punishment which he suffers by reason of the sentence imposed is cruel and unusual.

Smith calls our attention to the fact that a number of states have not seen fit to designate as a felony the offense of possession of 40 grams of marijuana. There are others which have done so. *See* National Governors' Conference, 3 *MARIJUANA: A Study of State Policies and Penalties* (1977) (hereafter *State Policies*). This study indicates that simple marijuana possession is always punished as a felony in two jurisdictions, never punished as a felony in three, and one state, Arizona, leaves the decision whether to treat possession as a felony to the court's discretion.

> Of the remaining 48 jurisdictions, *24* have specified an amount above which possession will always be considered a felony; in the other 24, the distinction still depends solely on the intent of the possessor.

(Italics ours.) *State Policies, supra* at 90.

The report on state marijuana policies further indicates there is little consensus regarding the amount required to elevate possession to felony status. Florida uses 5 grams; Hawaii uses 1 kilogram. The most popular elevation point is 1 ounce (28 grams). *State Policies, supra* at 90, 93. With regard to another factor, maximum imprisonment, it appears the laws also lack uniformity. However, a maximum of 5 years' imprisonment is decreed for the least serious felony in at least eight jurisdictions (including Washington) while at least five impose a maximum of less than 5 years and at least five set the maximum at more than 5 years. *State Policies, supra* at 95.

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[6] In that case, the statute in question had made it a criminal offense to have the status of drug addict. The court likened this to punishment for having a disease and said that such a punishment would universally be regarded as cruel and inhuman. While the minimum punishment prescribed was only 90 days in prison, the court said *any* punishment would be cruel and unusual, just as it would for the "crime" of having a common cold. There is no contention here that marijuana smoking is a status, cognizable under the *Robinson* doctrine, or that any punishment at all would be cruel and unusual.

Washington's statute makes possession of over 40 grams of marijuana or delivery of any amount punishable by a nonmandatory maximum of 5 years' imprisonment. When we set these provisions alongside nationwide practices, it is evident that the statutes of this state do not conflict with current punishment standards. Moreover, Washington is among the states which have added statutory provisions for the expungement or sealing of the state arrest records of persons who are not convicted. RCW 43.43.730(1); *State Policies, supra* at 108. One who receives probation, as Smith did here, may, upon compliance with the conditions of his probation, have the information or indictment dismissed. RCW 9.95.240.

Under any objective test, the punishment prescribed for possession of 40 grams or more of marijuana is not offensive to current societal values. Likewise, historical attitudes do not reflect an abhorrence of the penalties prescribed. Virtually every state remains committed to a policy of discouraging marijuana use. Federal law, applicable even in states where decriminalization has been achieved, proscribes its possession. 21 U.S.C. § 844(a) (1970). Historically, Washington's citizens who support liberal marijuana laws have consistently failed to gain broad-based citizen support for marijuana legalization or decriminalization initiatives. Evidently a substantial number of citizens are content with the existing laws and are not shocked by the penalty.

[6] We cannot say that these citizens, as well as the legislature, are wrong and that the punishment for marijuana possession is *grossly* disproportionate to the offense. A punishment is grossly disproportionate only if the conduct should never be proscribed, *see, e.g., Robinson v. California, supra*,[7] or if the punishment is clearly arbitrary

[7]In *Robinson v. California, supra*, a state attempted to punish a person for his status as a drug addict. Possession of a drug is not a status. Also, defendants admit marijuana possession, at least in some circumstances, may be prohibited; thus, *Robinson's* test is inapplicable.

and shocking to the sense of justice. *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 355 U.S. 834, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957); *Louisiana Affiliate of Nat'l Organization for the Reform of Marijuana Laws v. Guste*, 380 F. Supp. 404 (E.D. La. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975), *cert. denied*, 423 U.S. 867, 46 L. Ed. 2d 96, 96 S. Ct. 129 (1975).

[7] In *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958), the Supreme Court held that denationalization for wartime desertion was shocking and violative of this standard because it placed the individual totally at the sufferance of the country in which he finds himself. In *State v. Gitchel*, 5 Wn. App. 93, 486 P.2d 328 (1971), a punishment which required a convicted person to absent himself permanently from the state was held excessive. But no appellate courts, insofar we we have been shown, have been persuaded that a punishment of up to 5 years in prison and/or a fine for marijuana possession is shocking to the sense of justice and totally arbitrary.[8] Nor has any held that conviction of a felony, without regard to the punishment imposed, violates these constitutional provisions.

Considering all the factors that have a bearing on the question, then, we conclude that Smith's punishment, a deferred sentence of 5 years and probation of 3 years, was not grossly disproportionate to the offense.

Accordingly, we hold that the defendant Smith was not subject to cruel and unusual punishment for his violation of RCW 69.50.401(c).

III

Defendants also contend RCW 69.50.401(a) and (c) are unconstitutional as applied to possession of marijuana for personal use in one's own home. They argue enforcement of these statutes under the above circumstances invades a

[8]The theory was rejected in *Louisiana Affiliates of Nat'l Organization for the Reform of Marijuana Laws v. Guste, supra.*

right to privacy, and that this invasion is not justified when the prohibited activity is relatively harmless.

[8] This contention was raised before the Court of Appeals, Division Two, in *State v. Anderson*, 16 Wn. App. 553, 558 P.2d 307 (1976). Speaking through Pearson, J., that court delivered an opinion upon which we do not believe we can make substantial improvement. We therefore adopt it in pertinent part, with minor modifications, as our own, and set it forth herewith:

> [The defendants urge] this court to hold, first, that there is a constitutional right to privacy in the home encompassing the possession and noncommercial delivery of marijuana, and second, if such a right exists, that the State does not have the compelling state interest necessary to justify regulation in this area. We decline to adopt the position that the right of privacy extends to the possession or delivery of marijuana.
>
> While there is no "right of privacy" found in any specific guaranty of the United States Constitution, the United States Supreme Court has recognized constitutional "zones of privacy" which limit governmental power. *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). Only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guaranty of personal privacy. *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). If the possession and noncommercial delivery of marijuana come within a constitutional "zone of privacy" then there must be a compelling state interest to justify regulation in this area. *Roe v. Wade, supra; cf. Darrin v. Gould*, 85 Wn.2d 859, 540 P.2d 882 (1975).
>
> The overwhelming majority of jurisdictions which have considered the right of privacy and the possession or use of marijuana are in accord. No constitutional right of privacy exists which encompasses the right to possess and use marijuana. *Kreisher v. State*, 319 A.2d 31 (Del. 1974). The constitutional right of privacy does not prevent the legislature from proscribing the possession of marijuana for private use. *State v. Renfro*, ___ Hawaii ___ [56 Haw. 501], 542 P.2d 366 (1975). Michigan laws which prohibit the possession, use and sale of marijuana do not violate the constitutional right to privacy. *People v. Alexander*, 56 Mich. App. 400, 223 N.W.2d 750 (1974).

The right to smoke marijuana is not fundamental to the American scheme of justice, it is not necessary to ordered liberty, and it is not within a zone of privacy. *Commonwealth v. Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969). Possession of marijuana is not a fundamental right guaranteed by the United States Constitution. *State v. Anonymous*, 32 Conn. Supp. 324, 355 A.2d 729 (1976).

Only one jurisdiction has recognized a right to privacy in the home which encompasses the use and possession of marijuana. The Alaska Supreme Court in *Ravin v. State*, 537 P.2d 494 (Alas. 1975) held that no adequate justification exists for the state's intrusion into the citizens' right of privacy by its prohibition of the possession of marijuana by adults for personal consumption in the home. There are at least three grounds for refusing to apply the Alaska ruling in this case.

First, the *Ravin* decision is substantially based upon the strong right to privacy provision of the Alaska Constitution.[1] The Alaska court evidenced the importance of this provision to its ruling when it concluded that "citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home . . ." *Ravin v. State, supra* at 504. Washington does not have an equivalent privacy provision in its constitution, nor does case law establish such a strong right to privacy.

A second distinction is that the Alaska court rejected the fundamental right-compelling state interest test, and used a special test to determine the constitutionality of the statute prohibiting the possession of marijuana. The court stated that if it was employing the fundamental right-compelling state interest test "we would hold that there is no fundamental right, either under the Alaska or federal constitutions, either to possess or ingest marijuana." *Ravin v. State, supra* at 502. Washington courts have utilized the fundamental right-compelling state interest test in the past, *see Darrin v. Gould, supra*, and we will not adopt a special test at this time.

Finally, the basis for the *Ravin* decision was the extension of the right of privacy in the home to the possession of marijuana. A leading case on the right of privacy in the home, *Stanley v. Georgia*, 394 U.S. 557, 22 L. Ed. 2d

542, 89 S. Ct. 1243 (1969), involved the possession of obscene material for an adult's personal use in the home. The United States Supreme Court held that possession of the material was protected in the home because the strong and fundamental First Amendment right to receive information was involved. The Supreme Court noted that its ruling did not infringe upon the power of the state to prohibit the possession of narcotics in the home. Other cases discussing the right to privacy in the home also limit that right to activities involving important or fundamental rights.[2] Possession of marijuana is not a fundamental right, *State v. Anonymous, supra*, and it is not tantamount to the exercise of a First Amendment right. Additionally, no authority or logic supports the contention that a right to deliver marijuana is [any] more fundamental than the right to possess it. Therefore, we refuse to extend the right of privacy in the home to either the possession or delivery of marijuana.

The *Ravin* decision is not persuasive and we adopt the position of those jurisdictions holding that statutes similar to RCW 69.50.401(a) and (d) do not unconstitutionally interfere with any right to privacy.

[1]Article 1, § 22 of the Alaska Constitution provides, in part: "The right of the people to privacy is recognized and shall not be infringed."

[2]*See generally, Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *United States v. Orito*, 413 U.S. 139, 37 L. Ed. 2d 513, 93 S. Ct. 2674 (1973). *Cf. State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (1975).

The trial courts and the Court of Appeals correctly refused to hold the statutes unconstitutional.

IV

Defendant Anderson raises an additional assignment of error peculiar to his case. He asserts the circumstances of his arrest warrant a finding of police misconduct or, at a minimum, an instruction informing jurors that police activity surrounding an arrest must be in good faith and not violative of public policy.

Prior to defendant Anderson's arrest, he was contacted at home by a police undercover agent. The agent's plan was to

pose as a drug dealer attempting to deliver two 1-pound packages of marijuana to some other party. The agent subsequently executed this plan and contacted Anderson. Anderson, upon seeing the marijuana, commented that it looked like "good stuff". The agent replied it was indeed quality marijuana. When Anderson further inquired whether the agent would be willing to sell the marijuana, the agent indicated he would not, because it was previously committed to another person. After this, Anderson agreed that the agent could come back at a later date and they could work out an arrangement for the sale of marijuana.

The agent returned on two later occasions, but neither time was opportune for discussing business. On a third occasion, however, the agent and Anderson discussed the drug price, and Anderson indicated his desire was to purchase between 1 and 3 pounds of marijuana. After this manifestation of intent, the agent asked Anderson if he had any marijuana in the house. When the agent received an affirmative reply, he suggested the two of them ought to smoke some in order to get better acquainted. Anderson declined to smoke, but gave the agent a small quantity of marijuana and invited him to take some with him. There is conflicting evidence as to whether the agent ever smoked this marijuana, but it is undisputed that Anderson possessed marijuana and also delivered the substance to the agent.

Sometime later a search warrant for Anderson's home was obtained based upon the presence of marijuana in that location. Upon execution of the warrant, marijuana in a quantity of less than 40 grams was confiscated, and Anderson was charged with the offenses of delivery and possession of marijuana.

It is Anderson's contention that, at trial, the court erred by refusing to give this proposed jury instruction:

> You are instructed that a criminal defendant invoking the defense of entrapment must show that the criminal design originated in the mind of the police officer and not with the accused, and that the accused was lured or

induced to commit a crime he had not intended to commit. If the crime originated in the mind of the accused, an officer may afford the accused an opportunity to commit the crime, and, when acting in good faith and not acting against public policy, make use of deception.

The trial court judge gave instruction No. 8, which reads:

> You are instructed that Entrapment is a defense to the charge against the defendant, and if established entitles the defendant to an acquittal.
>
> Entrapment occurs where the criminal design originates in the mind of the police officer or informer and not the accused, and the accused is lured or induced into committing a crime he had no intention of committing.
>
> The mere use of a decoy or informer to present an individual with an opportunity to commit a crime does not in itself constitute entrapment.

[9] The majority view in entrapment cases treats police conduct as secondary *unless* the conduct serves to entrap an unwary defendant into committing a crime he had no intention of committing. *United States v. Russell*, 411 U.S. 423, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973); *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 517 P.2d 245 (1973). It has never been supposed that the jury must be instructed to weigh public policy or good faith in reaching its decision on whether the defense of entrapment has been made out. Rather, under Washington law its deliberations are to be directed to the question of whether the criminal design originated in the mind of law enforcement officials who lured or induced the defendant to commit a crime which he otherwise had not intended to commit.

The jury instruction given by the court correctly reflects this concept and the law regarding the defense of entrapment. Failure to give the proposed instruction was not error.

Defendant further argues that as a matter of law the police conduct was contrary to public policy.

[10] In affording a suspect with an opportunity to violate the law, police may use some subterfuge. For example,

an officer may pose as a drug dealer, fence, or prostitute. *State v. Gray, supra.* In *United States v. Russell, supra,* the defendant argued that the government's agent who supplied a scarce ingredient had become so involved in the criminal activity that any prosecution for manufacturing an illegal drug violated fundamental principles of due process. The United States Supreme Court, noting the necessity of the agent's illicit participation, stated that the conduct was not so shocking as to violate fundamental fairness.

The conduct of the officer in Anderson's case, which, distasteful as all subterfuge is, can hardly be said to have been so shocking as to violate fundamental fairness.

V

Defendants Redwine also raise additional assignments of error peculiar to their case. They contend the search warrant for their home is constitutionally infirm, that the police violated the knock and notice statute, and that the sentences were unfair.

The defendants Redwine urge that the trial court erred in admitting in evidence the fruits of a search conducted pursuant to a warrant issued by a magistrate. The warrant authorized a search of the defendants' home and of the fenced yard behind it, in which an officer had observed marijuana plants growing. He testified before the magistrate that there was "no question" but what the plants were marijuana plants. The officer's inspection of the yard had been made in response to a complaint that such plants were growing in it. The Redwines contend that the officer's opinion of the identity of the plant was not sufficient to support a finding of probable cause to search. They suggest that a chemical test should have been made. Further, they maintain that information which the officer received from an informant was not shown to be reliable.

We find no merit in these contentions. The officer satisfied the magistrate that he had sufficient familiarity with marijuana plants to recognize one when he stood within 10 feet of it, as he did in this case. There is no suggestion that

a marijuana plant is not distinctive enough to be recognized as such. As for the reliability of the officer's informant, that is rendered immaterial by the fact that the officer himself observed the plants growing.

[11] Federal and state constitutional requirements for search warrants are met when the issuing magistrate has, considering all the facts and circumstances sworn to by the police officer seeking the warrant, good reason to believe that criminal activity has occurred. *State v. Patterson*, 83 Wn.2d 49, 515 P.2d 496 (1973). As we said there, if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient; but if the underlying facts or circumstances are stated, as they were here, and the informant is reliable, and if the alleged facts show that a crime has probably been committed, the magistrate has before him evidence sufficient to justify the issuance of a warrant.

Where, as here, the officer himself has observed the incriminating evidence, the element of reliability is established, assuming the magistrate has confidence in the integrity of the officer.

The issuance of a search warrant is a matter of judicial discretion, and this court reviews its exercise only for abuse.

There can be no question but that the magistrate was justified in accepting the officer's opinion that what he had seen growing in the yard was marijuana. The testimony of the informant was unnecessary to establish this fact. This showing was sufficient to obtain a warrant to search the yard. Whether it also justified a search of the house we need not decide. The evidence shows that there were 178 plants growing in the yard. We can take judicial notice that this number of plants would produce more than 40 grams of usable drugs. Thus the State's prima facie case was established by the evidence of the number of plants growing in the yard, which were admittedly in the possession of the defendants Redwine. Thus, even though the admission of the fruits of the search of the house was error, which we do not decide, it was harmless error.

For this reason also, we need not consider a further contention that the search of the unoccupied house was rendered invalid because one of the officers involved failed to knock before entering.

Finally, the Redwines contend their sentences lacked an appearance of fairness and were in fact unfair because the sentences were inspired by a suspicion the Redwines were dealing in drugs.

[12] Appellate courts may review a trial court's imposition of sentence for abuse of discretion. Discretion is abused only when it can be said no reasonable person would adopt the view which was adopted by the trial court. *State v. Derefield*, 5 Wn. App. 798, 491 P.2d 694 (1971). Both Redwines were given deferred 5-year sentences to state correctional institutions. David Redwine was placed on probation for 3 years and was sentenced to 365 days in jail and fined $500. Loralyn Redwine was placed on probation for 2 years and sentenced to 90 days in jail. In both cases, the court reserved the right to suspend a portion of the jail sentence and indicated that it would do so. They state that the judge customarily did not impose a sentence of more than 60 days for possession of marijuana. It is contended that the judge was influenced by his belief that the Redwines were dealing in drugs, which it is alleged was not the case. The judge's remarks on sentencing indicate that he was concerned with David Redwine's prior juvenile record, as well as with the amount of marijuana being grown by the Redwines. He imposed jail sentences because he believed that a fine alone would not deter further violations.

We cannot say that, having this consideration in mind, the trial judge abused his discretion in prescribing the sentences.

The convictions are affirmed.

STAFFORD, WRIGHT, BRACHTENBACH, and HOROWITZ, JJ., concur.

UTTER, C.J. (concurring in part; dissenting in part)—I concur with the majority in affirming Anderson's conviction for delivery of a controlled substance in violation of RCW 69.50.401(a). Anderson's constitutional challenge to the conviction is limited to a claim of privacy in the performance of the unlawful conduct. Whatever may be the privacy claim of individuals in possession of marijuana for personal use, this claim does not protect those who would manufacture or deliver the substance.

I do agree with Justice Dolliver that the convictions of Smith and the Redwines for possession of marijuana under the terms of RCW 69.50.401(c) (now RCW 69.50.401(d)) violate federal and state prohibitions on cruel and unusual punishments.

I do not reach the equal protection and privacy claims of those convicted for possession of marijuana, nor the alternative constitutional claims regarding delivery which are not before us.

DOLLIVER, J. (concurring in part; dissenting in part)—Marijuana is an intoxicant. It is one of three major recreational drugs used in the United States; the other two are tobacco and alcohol. It is smoked regularly by nearly 15 million Americans; probably in excess of 30 million citizens have tried it. National Institute on Drug Abuse, Secretary of Health, Education and Welfare, 6th Annual Report to United States Congress, *Marihuana and Health* (1976). In every state there is some penalty for the possession of marijuana. 3 National Governors Conference Research and Case Studies, *Marijuana: A Study of State Policies and Penalties* 99–104 (1977). It is probable "no other 'crime' is prosecuted so rarely in relation to the number of times it is committed, and no other conduct is so consistently rejected as being 'criminal' by so many people." M. Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 Conn. L. Rev. 601, 686 (1974). In Washington, a person who possesses more than 40 grams (28 grams equals 1 ounce) of

marijuana may be arrested and convicted of a felony with a maximum sentence of 5 years in a state prison, a fine of up to $10,000, or both (RCW 69.50.401(c)) (now RCW 69.50-.401(d)), and will lose certain rights. *See, e.g.*, RCW 29.01-.080, RCW 42.04.020, RCW 4.44.160 and Const. art. 6, § 3. *See generally* W. Grant, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970).

I agree with the majority that constitutional rights of equal protection and privacy are not offended by RCW 69.50.401(a), (c). I do not, however, agree with the majority as to the inapplicability of the eighth amendment to the United States Constitution and Const. art. 1, § 14. I would hold RCW 69.50.401(c) as it applies to mere possession of marijuana to violate these constitutional provisions which prohibit cruel and unusual punishment. I do not contend RCW 69.50.401(a), which makes it a crime "to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance", violates either the federal or state constitutions.

While the majority recites both the history of cruel and unusual punishment and the general view taken by the courts for application of the constitutional restraint, it fails to delineate fully the tests developed by courts to trigger the application of the constitutional requirements or to measure RCW 69.50.401(c) against those tests.

Although legal literature and cases on the use of the Eighth Amendment are meager, some general principles have evolved. *See, e.g., The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966); Soler, *supra* at 676; *The Eighth Amendment, Beccaria, and the Enlightenment; An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783 (1975); *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A. L. Rev. 1136 (1974); *Coker v. Georgia*, 433 U.S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *In re Lynch*, 8 Cal. 3d

410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); *see generally Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, Annot., 33 A.L.R.3d 335 (1970).

In *Weems v. United States*, 217 U.S. 349, 367, 54 L. Ed. 793, 30 S. Ct. 544 (1910), the Supreme Court stated:

> [I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.

In *State v. Fairbanks*, 25 Wn.2d 686, 689, 171 P.2d 845 (1946), we said:

> It may be conceded that duration of imprisonment fixed as a penalty may be so incommensurate with the gravity of the offense committed as to be violative of this provision of the state constitution and of the kindred provision contained in the eighth amendment to the Federal constitution.

Not only must the proportionality of the punishment to the offense be considered, it must be considered "in the light of contemporary human knowledge". *Robinson v. California*, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962). *See also Trop v. Dulles*, 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958). In a recent review of the Eighth Amendment, the Supreme Court said:

> [T]he Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg* [*Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)], a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

*Coker v. Georgia*, *supra* at 592. In this case, only the question of proportionality is relevant.

The question is not whether the state can or should regulate or discourage the use of marijuana; both are clearly within its power. Nor is the question before us the social

desirability of discouraging the use of marijuana. Rather, it is whether the punishment chosen by the legislature for violating its statutory regulations as to the possession of over 40 grams of marijuana is disproportionate to the offense when tested against "evolving standards of decency". *Trop v. Dulles*, *supra* at 101.

As to the question of cruel and unusual punishment, the trial court concluded:

> Finally, the defense has argued that the felony statute, in providing for a prison sentence of five years, constitutes cruel and unusual punishment. Again, the authorities cited by counsel do not establish that the defendant has standing to make this argument prior to conviction and sentence. Notwithstanding, as with the other constitutional arguments raised by the defendant, the hazards presented to society by the use of marijuana do not permit this court to conclude that RCW 69.50.401(c) is not fairly and substantially related to a legitimate legislative purpose.

The trial court's use of the rational relationship test may have been appropriate for determining whether the statute violated equal protection guaranties. It is not, however, appropriate for determining whether the sentence imposed under the statute is grossly disproportionate to the crime and constituted cruel or unusual punishment. The proper analysis to determine whether the felony classification for conviction and the maximum 5-year sentence and $10,000 fine is excessive or overly severe is a threefold test which appears to be generally accepted for determining if the punishment is disproportionate to the crime and thus violative of the prohibitions against cruel and unusual punishment. *See In re Lynch*, *supra*; *In re Jones*, 35 Cal. App. 3d 531, 110 Cal. Rptr. 765 (1973); *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976); *Downey v. Perini*, 518 F.2d 1288 (6th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 993, 46 L. Ed. 2d 367, 96 S. Ct. 419 (1975); *State v. Mitchell*, 563 S.W.2d 18, 28 (Mo. 1978) (Seiler, J., dissenting); 21 U.C.L.A. L. Rev., *supra* at 1146.

Those tests (only the last of which is even mentioned by the majority) are:

1. The degree of danger the offender and the subject matter of the offense, in this case marijuana, present to society;

2. A comparison of the punishment for possession of marijuana with the punishment for more serious crimes and for offenses of a similar nature; and

3. A comparison of the punishment for marijuana possession in Washington with the punishment for the same offense in other jurisdictions.

I

I see nothing to be gained by arguing with the majority or the trial court over the evidence as to the dangers of marijuana nor is it necessary to do so. The views of the plaintiffs and defendants were fully documented before the trial court, the trial court made a thorough review of the evidence, and its findings contained in the memorandum decision are sufficient. The following documents were admitted in evidence before the trial court: National Institute on Drug Abuse, United States Department of Health, Education, and Welfare, *Marijuana Research Findings: 1976* (Petersen ed. 1977); L. Grinspoon, *Marijuana Reconsidered* (2d ed. 1977); National Institute on Drug Abuse, Secretary of Health, Education, and Welfare, 4th through 6th Annual Reports to the United States Congress, *Marijuana and Health* (1974–76); National Commission on Marijuana and Drug Abuse, 1st Report, *Marijuana: A Signal of Misunderstanding* (Shafer Rep., 1972); National Commission on Marihuana and Drug Abuse, 2d Report, *Drug Use in America: Problem in Perspective* (Shafer Rep., 1973); Consumers Union Report, *Licit & Illicit Drugs* (Brecher ed. 1972); Report of the Commission of Inquiry into the Non-Medical Use of Drugs, *Cannabis* (Canada 1972); L. Miller, *Marijuana Effects on Human Behavior* (1974); Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and other

Internal Security Laws of the Senate Committee on the Judiciary, 93d Cong., 2d Sess., *Marijuana–Hashish Epidemic and Its Impact on United States Security* (1975); G. Nahas, *Keep Off the Grass* (1976); J. Tinklenberg, *Marijuana and Health Hazards* (1975); M. Braude and S. Szara, 1 and 2 *Pharmacology of Marihuana*, A Monograph of the National Institute on Drug Abuse (1976); G. Nahas, *Marihuana Chemistry, Biochemistry, and Cellular Effects* (1976).

In its decision, the trial court said:

> It is apparent from the evidence presented by both sides in this proceeding that marijuana has been grossly misunderstood by many Americans of both high and low stations in life.
>
> Despite exhaustive research by the medical profession and other scientists in this country and abroad in recent years, and observations of entire cultures of marijuana smokers over generations around the world, there does not appear to be a single documented case of permanent physiological or psychological harm from this drug. Clearly, marijuana is most notable for the psychological "high" it produces, a form of intoxication similar in some respects to that produced by alcohol. It is this "euphoria" which has encouraged in excess of 30 million people in this country to try it, and which keeps perhaps half of that number coming back.
>
> The intensity of the effect of the drug is dependent upon the quantity consumed, although it is accepted that tolerance to the drug is developed with regular use, and there often is a moderate seeking of higher dosage levels. However, there is not an addictive quality, and even psychological dependency is very unusual. The rare case of anything related to withdrawal symptoms seems to occur with only extremely heavy usage, and even then moderate irritability seems to be the only apparent symptom.
>
> The "stepping-stone" theory as a characteristic of marijuana use simply is not true. There is no evidence that marijuana leads one on to the use of other drugs. No cause and effect relationship exists. The fact that certain personality types may use marijuana and then go on to other drugs cannot bolster any condemnation of marijuana. It would seem more logical to suggest that many

people who might seek out relatively more dangerous drugs do not do so by virtue of their "discovery" of marijuana.

Marijuana does not make the user more violent or aggressive. To the contrary, the effect of marijuana intoxication is to relax and make one less aggressive.

No evidence has been developed to substantiate the frequently stated belief that marijuana use causes an increase in criminal activity of any kind, must less violent crime. However, to say that there is no cause and effect relationship between marijuana and crime is not to say that some people who use and enjoy marijuana will not steal and rob to obtain the funds with which to buy the drug. Particularly for young people, marijuana is not inexpensive, and there is uncontroverted testimony in this record of one former drug user that regularly stole to obtain the wherewithal to buy marijuana.

Although it may be safe to say that moderate or even moderately heavy use of marijuana has not been shown to be harmful to the human organism, that is not the same thing as saying that science may not soon show that it does cause harm as studies and research techniques improve. Marijuana is a psychedelic drug and it is presently well established that it does have a measurable effect on humans and animals. Already, reputable scientists are convinced that the burning vegetable matter of which marijuana is composed will be shown to be cancer producing in much the same way as tobacco. However, this concern is moderated somewhat by the fact that moderate use of two or three joints per day is not comparable to the typical cigarette smoker's consumption of twenty to forty cigarettes per day.

Marijuana use does make the heart work harder, and increases the demand for oxygen. It has been shown to increase pain in angina patients, and carries a real risk for heart patients, and for those who are unaware that they have heart problems. It does reduce blood pressure.

Although low dose smoking does dilate or open lung passages, continued regular use over several weeks does cause cellular irritation and bronchitis, both of which impair lung function.

Although effects on the body's immune response system, chromosomes, and endocrine system have been demonstrated, at normal levels of usage there is as yet no

clinical evidence that the user is more likely to contract illness or conceive defective children than the non-using population, and despite some contradictory studies, there is no reliable evidence that even heavy long-term use of marijuana causes any permanent brain damage or permanent impairment of brain function.

It is important to note that the studies which have permitted the foregoing conclusions have been very largely based upon studies of healthy male subjects in the prime of life. Very little research has been done on groups for whom harm from marijuana use may prove a reality. These would include women, especially those in their child bearing years. Children, and especially those just achieving sexual maturity, have not been studied. Also, those of advanced years and those with known bodily infirmities have not received careful attention. Finally, little is known about the interaction of this drug with other drugs in the body, an area deserving of substantial additional attention.

The foregoing review of the known or suspected harm from marijuana would seem to provide an inadequate foundation on which to base a felony statute. The remote prospect of some future harm does not seem to constitute a fair and substantial basis for such an enactment. If the statute is to stand, its justification must be found in the acute or immediate effect of the drug, and those effects will now be examined.

Thus, the trier of fact found the "harm" alleged or suspected from marijuana use was not a sufficient basis for a statute which made possession of more than 40 grams a felony. Rather, in upholding the statute the trial court relied on what it called the "acute or immediate effect of the drug". In its concluding summary, the trial court detailed these effects as follows:

> Marijuana creates a euphoric state of intoxication which impairs learning, incentive, efficiency, and motor coordination, matters clearly affecting the health, education and welfare of the people of the state.

In summary, the trial court found: Marijuana has never been shown to cause physiological or psychological harm. It is not addictive. Users do not suffer withdrawal symptoms. There is no evidence the use of marijuana leads to the use

of other drugs. Marijuana does not make the user more violent or aggressive. There is no cause and effect relationship between marijuana and criminal activity. There is no clinical evidence that a marijuana user is more likely to become ill or conceive defective children than nonusers. There is no reliable evidence that even heavy, long-term use of marijuana causes any permanent brain damage or permanent impairment of brain functions. *See also State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970).

This is an impressive catalog of what marijuana does not do. The findings of the trial court strike directly at the many emotional assertions and superstitions as to the nature of marijuana and marijuana use and show them to be false. The court did find, however, that marijuana does create a euphoric state of intoxication in which learning, incentive, efficiency and motor coordination are impaired. Does this degree of danger to a marijuana user and the surrounding society in any way justify 5 years in a state prison, a $10,000 fine and the loss of a person's rights? I cannot believe it does. I do not disagree that there are some dangers associated with the use of marijuana and that the people, acting through the legislative process, may respond to those dangers. Nor do I contend policies and programs to discourage the use of marijuana are inappropriate or improper. Furthermore, it may well be there are some as yet undiscovered and unverified long-term dangers. But it hardly seems like the hallmark of a civilized society nor is it constitutional "in the light of contemporary human knowledge" (*Robinson v. California, supra* at 666) to obtain public awareness of the dangers, known or unknown, of marijuana by branding persons felons for the mere possession of anything over 40 grams of the substance, subjecting them to the prospect of 5 years in a state prison, a $10,000 fine, and the certainty of the loss of the right to vote, the right to hold public office, and other "civil rights".

We have long since decided with reference to the possession of other substances, the ingestion of which causes harmful effects, that felony statutes are not appropriate.

Such common and easily available household drugs as alcohol, tobacco and caffeine—the long-term deleterious effects of which are well documented and well known—come readily to mind. *See* M. Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 Conn. L. Rev. 601, 617-19 (1974). Once the underbrush of superstition and false information has been swept aside as has been so ably done by the trial court, the penalty, given the danger to the offender and to society, is totally out of proportion to the offense. To use the language of the majority, this "punishment is . . . shocking to the sense of justice".

In this connection, it may be noted there is another vegetable substance common to Washington possessed in varying quantities—invariably over 40 grams—by large numbers of our citizens. It is poisonous if ingested and can cause death. *See* 6 Encyclopaedia Britannica, *Macropaedia Noxious Ericads* 955 (15th ed. 1974). The response in this state has been not to send people to prison for possession of this plant, but rather to warn them against the danger and, by action of the legislature, to declare it the State Flower. It is the rhododendron. *See* RCW 1.20.030.

II

Next, how does the punishment for possession of over 40 grams of marijuana compare with the punishment for more serious crimes in this state, or for offenses of a similar nature? No mention of this test is made by the majority. Even a cursory reading of RCW 9A gives convincing evidence of the disproportionate nature of RCW 69.50.401(c). All of the following offenses, each far more serious than possessing over 40 grams of marijuana, are class C felonies and subject a guilty person to 5 years in the state penitentiary or a maximum fine of $5,000 or both: second-degree manslaughter, when, with criminal negligence, the death of another is caused, RCW 9A.32.070; third-degree assault, RCW 9A.36.030; second-degree theft, RCW 9A.56.040; unlawful imprisonment, RCW 9A.40.040; extortion in the

second degree, RCW 9A.56.130; first–degree reckless burning, RCW 9A.48.040; second–degree malicious mischief, RCW 9A.48.080; riot with a deadly weapon, RCW 9A.84-.010; forgery, RCW 9A.60.020; taking of a motor vehicle, RCW 9A.56.070; bigamy, RCW 9A.64.010; incest, RCW 9A.64.020.

I find it grossly disproportionate to include the mere possession of over 40 grams of marijuana in the same category as the crimes cataloged above. Furthermore, except for a third conviction for unlawful use of the official liquor control board seal (RCW 66.44.120), none of the penalties for violating the alcoholic beverage control statutes (RCW 66.44) is more than a gross misdemeanor. The known dangers of alcohol to an individual and society, which far exceed the "acute or immediate effect of marijuana" are too well known to require review here. If, on the other hand, a person at home had a meeting aimed at overthrowing the government by force (RCW 9.05.040); possessed a collection of switchblades or brass knuckles (RCW 9.41.250) or dangerous inhalants for sale (RCW 9.47A.050); had beaten someone in a simple assault (RCW 9A.36.040); or discharged a gun in the neighborhood (RCW 9.41.230); or had driven on the public highway while intoxicated, clearly endangering the lives of others (RCW 46.61.515), no felony charge would be made. RCW 69.50.401(c) does not meet the second test for constitutionality.

III

How does the penalty in Washington compare with other states? While the data used by the majority in comparing state statutes is accurate, it approaches the question from the wrong perspective. It is far more illuminating to list those states where the mere possession of the amount of marijuana, or less, which is proscribed by Washington law can result on the first offense in a penalty of 5 years in prison. There are only 10 states, including Washington, or 20 percent, which have such a severe penalty. In only 6 states (12 percent), including Washington, is the fine for

the first offense, regardless of the prison term, $10,000 or more. Additionally, while RCW 69.50.401 distinguishes the various activities associated with marijuana use in our society, it does not impose less stringent penalties for mere possession of the controlled substance. Most other states impose greater penalties for sale and possession with intent to distribute than for mere possession. Only 6 states (12 percent), including Washington, fail to make this distinction. In contrast to the views of the majority, it does appear that Washington is in a small minority among the states in the severity of its penalties for mere possession of marijuana.

The majority contends the strictures of the article 1, section 14 provision should not apply unless the punishment inflicted is in fact cruel amd unusual; that mere conviction is not enough. *State v. Fairbanks*, 25 Wn.2d 686, 171 P.2d 845 (1946). In raising a proportionality challenge under the Eighth Amendment, a defendant may challenge the sentence actually imposed on him as unconstitutionally disproportionate to the offense which he committed. *See, e.g., State v. Fairbanks, supra; Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979). The defendant also can challenge a criminal statute on its face as setting a penalty that is unconstitutionally disproportionate to the offense proscribed by the statute. *See, e.g., Gallego v. United States*, 276 F.2d 914, 918 (9th Cir. 1960); *see also, e.g., Downey v. Perini*, 518 F.2d 1288, 1291–92 (6th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 993, 46 L. Ed. 2d 367, 96 S. Ct. 419 (1975); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), *explained in People v. Wingo*, 14 Cal. 3d 169, 175–76, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); *see generally* Annot., 33 A.L.R.3d 335 (1970), at section 4.

Defendant Smith raises both types of challenges in this case. He claims that (1) the penalty actually imposed on him—the imposition of felony status and consequent loss of civil liberties—is unconstitutionally disproportionate to the offense which he committed; and (2) RCW 69.50.401(c)

(now (d)), on its face violates the Eighth Amendment because the statutorily prescribed penalty (imprisonment for 5 years and/or $10,000) is unconstitutionally disproportionate to the offense of simple possession of more than 40 grams of marijuana.

I believe the better rule is that the maximum term permitted by the statute—5 years—must be considered rather than the actual sentence imposed by the judge or the action of the Board of Prison Terms and Paroles (*see In re Lynch, supra; Downey v. Perini, supra; Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983, 39 L. Ed. 2d 495, 94 S. Ct. 1454 (1974); *see also State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976). Even if the maximum sentence is not imposed, "[i]f . . . the sentence prescribed by [the] statute is cruel and unusual within the meaning of the Eighth Amendment, the statute itself is unconstitutional and any sentence imposed thereunder must be set aside". *Gallego v. United States*, 276 F.2d 914, 918 (9th Cir. 1960). Defendant is unable to enforce any expectation for a deferred execution of the sentence and probation. Therefore, the court must look to the maximum sentence to which defendant is liable and not to any conditional deferral granted by the trial court. *Rummel v. Estelle*, 48 U.S.L.W. (U.S. Mar. 18, 1980), *and see also* Powell, J., dissenting at page 4269. Nevertheless, even under the majority position, the Eighth Amendment and article 1, section 14 would be violated. Upon conviction under RCW 69.50-.401(c) (now (d)), a person becomes a felon. RCW 9A.04-.040. To assume the status of a convicted felon, to lose the right to vote (Const. art. 6, § 3; RCW 29.01.080), or to hold public office (RCW 42.04.020), and your "civil rights" (*see* 23 Vand. L. Rev. 929 (1970)); RCW 4.44.160; 28 U.S.C. §§ 1861, 1865 (1976 ed.) (service on juries), simply for mere possession of over 40 grams of marijuana does not comport with current standards of decency.

I do not believe RCW 69.50.401(c) meets any of the three tests of constitutional validity under the cruel and unusual punishment clauses of the United States and Washington

constitutions. While the legislature is accorded broad discretion in enacting penal statutes and in specifying punishment for crime, and while we must give deference to the legislature as it makes its determinations, under the constitution the final judgment as to whether the punishment decreed by the legislature exceeds constitutional limits is a judicial function. When a statute comes before us which imposes penalties disproportionate to the offense we are bound to hold that statute unconstitutional. To punish a person by 5 years in a state prison and a $10,000 fine and to take away that person's rights for mere possession, and no more, of over 40 grams of marijuana does, in my opinion, violate both the Eighth Amendment and Const. art. 1, § 14.

I would not hold and do not contend that criminal penalties cannot be assessed for possession of marijuana. It should be emphasized that a declaration that RCW 69.50-.401(c) is unconstitutional does not remove all criminal sanctions for possession. RCW 69.50.401(d) (now (e)), which makes possession of *any* amount of marijuana a misdemeanor meets the requirement of the Eighth Amendment and Const. art. 1, § 14, and would continue to be valid. The penalty is "imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars". RCW 9.92.030. While the wisdom of this penalty may be questioned by some, since its constitutionality is clear the determination is properly within the province of the legislature. *See Furman v. Georgia*, 408 U.S. 238, 258, 280, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Brennan, J., concurring).

I would declare RCW 69.50.401(c) (now (d)) unconstitutional and reverse all convictions under this section of the statute. I would affirm the other convictions.

HICKS and WILLIAMS, JJ., concur with DOLLIVER, J.

# APPENDIX B:
# DECISION OF THE TRIAL COURT

## APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

| | | |
|---|---|---|
| THE STATE OF WASHINGTON, Plaintiff, | ) | |
| vs. | ) | No. 8418 |
| JAMES H. SMITH, Defendant. | ) | MEMORANDUM DECISION |

James H. Smith is charged with possession of marijuana in Snohomish County on or about October 15, 1976. If convicted of this felony, he may be sentenced to the Department of Institutions and imprisoned for up to five years.

Mr. Smith waived his right to a jury trial, and the case was tried to the Court. The facts are clear, and not controverted. Mr. Smith, at the time of the search of his premises, was in possession of marijuana in quantities substantially in excess of the

40 grams required to constitute a felony. Mr. Smith was cultivating a greenhouse crop in order that he avoid having to buy from drug dealers. He admits to providing marijuana to his friends, both for social smoking at his residence, and perhaps on occasion, for them to use away from his residence. However, beyond question, his primary purpose was for his personal use. He had found that his anxieties and tensions were only aggravated by his former use of alcohol, and that the substitution of marijuana not only helped these problems, but had significantly improved his relationships within his family.

Someone informed the Snohomish County Sheriff of Mr. Smith's marijuana supply, a search warrant was issued, and his home was thoroughly searched. Undoubtedly, from the perspective of the Smith family, the search was a complete ransacking, and cause

for substantial indignation.

The State and prosecuting attorney for Snohomish County, through Deputy Prosecuting Attorney Timothy P. Ryan, and the defendant, as represented by his counsel, Timothy K. Ford, stipulated that the defendant would be permitted to put before the Court expert testimony and other evidence in support of a defense motion to dismiss the information on constitutional grounds. This stipulation was first presented to the Court some weeks before the trial in chambers, and it was stated and understood that the State would be similarly permitted to produce experts in support of the felony possession statute's validity. The Court was requested to make extended trial time available on a flexible basis to accomodate the availability of the nationally recognized experts who were to be flown in from around the country. The substance of this

stipulation was entered of record.

Despite the agreed upon format of the hearing on the motion to dismiss, the Court is of the view that the burden of proof remained with the defendant to overcome the presumption of constitutionality of the criminal statute in this case.

The defendant's challenge is a multi-pronged attack: he charges invasion of privacy, violation of equal protection under the Fourteenth Amendment to the United States Constitution, and violation of the privileges and immunities clause of Section 12, Article I of the Washington Constitution, and emphasizes that the statute in question is over-inclusive by reason of its punishing a private individual for possession of marijuana under a classification of drugs of "high abuse" potential. He also argues that the statute is under-inclusive in that certain drugs such as alcohol and

tobacco are not included. Finally, the defense argues that the prospect of a five year prison term for such an innocuous offense constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and Article I, Section 14 of the Washington Constitution.

Providing for the health and welfare of the people is the ultimate justification for the existence of government. That it has responsibility in these areas is beyond challenge, and that the legislative body of the State has authority to enact laws to accomplish these ends is the very essence of legislative purpose.

The threshold question to be decided by this Court is the appropriate standard of review to be employed in evaluation of the defendant's constitutional attack on RCW 69.50.401(c).

It is generally accepted by constitutional authority that legislation which seeks to restrict or interfere with fundamental rights will be suspect when viewed by the judiciary. Such restrictive rules or laws will be carefully scrutinized, and only upheld if there is a compelling State interest to be served. Darrin vs. Gould, 85 Wn.2d 859 (1975). In relation to the present case, there is no right to possess or to smoke marijuana, either express or implied. Nor has compelling authority established a right to possess or smoke marijuana in the privacy of one's own home, under either the Washington Constitution (see Ravin vs. State, 537 Pac. 2d 494 (Alaska, 1975) or the Constitution of the United States.

The vast body of legislation does not interfere with fundamental rights of the citizenry. Traditionally, the judiciary

has been quite circumspect in these cases in recognition of the principle of the separation of powers, and out of deference for the collective wisdom of the legislative branch of government. If the reviewing court is able to say that the subject legislation bears even a minimally rational relationship to the end to be served, the law will survive a constitutional challenge. Frequently a court will interpret this standard of review as requiring that the law stand if one is able to imagine a set of facts under which the enactment would appear rational.

In recent years, many courts, including our own Supreme Court, have come to recognize the gulf between the two extreme standards set forth above. This is recognition that much legislation has significant impact on very substantial interests of the public, even though fundamental

rights are not involved. A new standard of review has evolved of somewhat greater flexibility than before, and may be described as the "enhanced" or "invigorated" rational basis test. This test carefully evaluates the quality of the interest being interfered with, and requires that the legislation bear a fair and substantial relationship to the object or purpose of the legislation. State vs. Martinez, 85 Wn.2d 671 (1975). This standard lends itself particularly well to analysis of equal protection challenges. Unfortunately, the precise scope of the terms "fair" and "substantial" in this context have not been fully explained in the reported decisions, and this test can be most difficult in application. Certainly it is not intended that the Court substitute its judgment for that of the legislative body. Furthermore, decisions of our court subsequent to the

Martinez decision make it uncertain the extent to which the rational relationship test remains applicable. State vs. Ruzika, 89 Wn.2d 217 (1977); Crane Towing, Inc. vs. Slade Gorton, 89 Wn.2d 161 (1977). It is the view of this Court that if the challenged statute tends to promote the health, morals, education and welfare of the people, and if the particular statute bears a fair and substantial relationship to accomplishing such purpose, the statute must be upheld.

Further, the Court considers that in a proceeding such as this, wherein the question is one of law, formal findings of fact are neither necessary nor appropriate. However, it does appear appropriate for this Court to comment on its more significant observations regarding the facts which it has considered.

It is apparent from the evidence pre-

sented by both sides in this proceeding that marijuana has been grossly misunderstood by many Americans of both high and low stations in life.

Despite exhaustive research by the medical profession and other scientists in this country and abroad in recent years, and observations of entire cultures of marijuana smokers over generations around the world, there does not appear to be a single documented case of permanent physiological or psychological harm from this drug. Clearly, marijuana is most notable for the psychological "high" it produces, a form of intoxication similar in some respects to that produced by alcohol. It is this "euphoria" which has encouraged in excess of 30 million people in this country to try it, and which keeps perhaps half of that number coming back.

The intensity of the effect of the

drug is dependent upon the quantity consumed, although it is accepted that tolerance to the drug is developed with regular use, and there often is a moderate seeking of higher dosage levels. However, there is not an addictive quality, and even physiological dependency is very unusual. The rare case of anything related to withdrawal symptoms seems to occur with only extremely heavy usage, and even then moderate irritability seems to be the only apparent symptom.

The "stepping-stone" theory as a characteristic of marijuana use simply is not true. There is no evidence that marijuana leads one on to the use of other drugs. No cause and effect relationship exists. The fact that certain personality types may use marijuana and then go on to other drugs cannot bolster any condemnation of marijuana. It would seem more logical to suggest

that many people who might seek out relatively more dangerous drugs do not do so by virtue of their "discovery" of marijuana.

Marijuana does not make the user more violent or aggressive. To the contrary, the effect of marijuana intoxication is to relax and make one less aggressive.

No evidence has been developed to substantiate the frequently stated belief that marijuana use causes an increase in criminal activity of any kind, much less violent crime. However, to say that there is no cause and effect relationship between marijuana and crime is not to say that some people who use and enjoy marijuana will not steal and rob to obtain the funds with which to buy the drug. Particularly for young people, marijuana is not inexpensive, and there is uncontroverted testimony in this record of one former drug user that regularly stole to obtain the wherewithal

to buy marijuana.

Although it may be safe to say that moderate or even moderately heavy use of marijuana has not been shown to be harmful to the human organism, that is not the same thing as saying that science may not soon show that it does cause harm as studies and research techniques improve. Marijuana is a psychedelic drug and it is presently well established that it does have a measurable effect on humans and animals. Already, reputable scientists are convinced that the burning vegetable matter of which marijuana is composed will be shown to be cancer producing in much the same way as tobacco. However, this concern is moderated somewhat by the fact that moderate use of two or three joints per day is not comparable to the typical cigarette smoker's consumption of twenty to forty cigarettes per day.

Marijuana use does make the heart work

harder, and increases the demand for oxygen. It has been shown to increase pain in angina patients, and carries a real risk for heart patients, and for those who are unaware that they have heart problems. It does reduce blood pressure.

Although low dose smoking does dilate or open lung passages, continued regular use over several weeks does cause cellular irritation and bronchitis, both of which impair lung function.

Although effects on the body's immune response system, chromosomes, and endocrine system have been demonstrated, at normal levels of usage there is as yet no clinical evidence that the user is more likely to contract illness or conceive defective children than the non-using population, and despite some contradictory studies, there is not reliable evidence that even heavy long-term use of marijuana causes any per-

manent brain damage or permanent impairment of brain function.

It is important to note that the studies which have permitted the foregoing conclusions have been very largely based upon studies of healthy male subjects in the prime of life. Very little research has been done on groups for whom harm from marijuana use may prove a reality. These would include women, especially those in their child bearing years. Children, and especially those just achieving sexual maturity, have not been studied. Also, those of advanced years and those with known bodily infirmities have not received careful attention. Finally, little is known about the interaction of this drug with other drugs in the body, an area deserving of substantial additional attention.

The foregoing review of the known or suspected harm from marijuana would seem to

provide an inadequate foundation on which to base a felony statute. The remote prospect of some future harm does not seem to constitute a fair and substantial basis for such an enactment. If the statute is to stand, its justification must be found in the acute or immediate effect of the drug, and those effects will now be examined.

Hallucinations and panic anxiety reaction to marijuana intoxication have been observed but both are extremely rare phenomena, the former usually associated with extremely heavy dosage, and the latter usually associated with the naive or inexperienced user. In either case, the cure is discontinuance and reassurance.

However marijuana is a psychedelic and mind altering drug. Generally, it creates a state of intoxication that continues after consumption for a period of two to four hours. At moderate dosages it does

not prevent the performance of routine mechanical tasks. In some cultural studies conducted abroad, it would appear that dull monotonous work is tolerated and accomplished while under the drug's influence that might not otherwise be accepted. On the other hand, the same studies show that efficiency is reduced significantly.

Marijuana does interfere with the orderly processes of the mind. The sense of time is modified somewhat by the relaxing effect of the drug, and complex reasoning is interfered with, as is the ability to concentrate effectively. Carefully controlled experiments have not explained just how the learning process is affected, but there is reliable evidence that information acquired during intoxication is not stored efficiently in the memory centers of the brain. The intangible known as "incentive" is depressed while under the influence, and

motor-mechanical coordination is significantly impaired. Detailed and carefully controlled studies now establish that the operation of motor vehicles while under the influence produces a substantially greater number of automobile accidents, including fatalities, than is the case with non-users. Airplane pilots, in simulator studies, made substantially greater errors in judgment while under the influence of marijuana, and some errors persisted for six hours after use.

The Court in this case recognizes that the observations reviewed on the foregoing pages constitute but the briefest summary of the vast materials presented to the Court. Not all authority would evaluate the evidence in the same way.

A striking example of contrary but unquestionably rational conclusions from evidence similar to that considered by this

Court follows:

United States Senator James O. Eastland, Chairman of the Senate Judiciary Committee conducted subcommittee hearings on May 9, 16, 17 and 20, 1974, and took testimony and evidence from more than two dozen highly qualified experts on the subject of marijuana use and effects. These reports, contained in State's Exhibit No. 37, were reviewed and considered by the Court. It is appropriate that Senator Eastland's observations and conclusions be quoted at some length:

> "I consider the hearings which are the subject of this record to be among the most significant ever held by the Senate Internal Security Subcommittee, or, for that matter, by any committee of Congress. The widespread interest already generated by the hearings suggest that they may play a role in reversing a trend towards national disaster.
>
> Without public awareness, our country has become caught up in a marijuana-hashish epidemic that

probably eclipses, in gravity, the national epidemics that have had so debilitating an effect on the population of a number of Middle Eastern countries. . . "

The collective testimony of the eminent scientists who came to Washington to testify may be summarized as follows:

(1) THC, the principal psycho-active factor in cannabis, tends to accumulate in the brain and gonads and other fatty tissues in the manner of DDT.

(2) Marijuana, even when used in moderate amounts, causes massive damage to the entire cellular process: . . .

Needless to say the confirmation that marijuana does such serious damage to the entire cellular process opens up an entire spectrum of frightening possibilities.

(3) Tied in with its tendency to accumulate in the brain and its capacity for cellular damage, there is a growing body of evidence that marijuana inflicts irreversible damage on the brain, including actual brain atrophy, when used in a chronic manner for several years.

(4) There is also a growing body of evidence that marijuana adversely affects the reproductive

> process in a number of ways, and that it poses a serious danger of genetic damage and even of genetic mutation.
>
> (5) Chronic cannabis smoking can produce sinusitis, pharyngitis, bronchitis, emphysema and other respiratory difficulties in a year or less, as opposed to ten to twenty years of cigarette smoking to produce comparable complications.
>
> (6) Cannabis smoke, or cannabis smoke mixed with cigarette smoke, is far more damaging to lung tissues than tobacco smoke alone. The damage done was described as "pre-cancerous."
>
> (7) Chronic cannabis use results in deterioration of mental functioning, pathological forms of thinking resembling paranoia, and a "massive and chronic passivity" and lack of motivation - the so-called "amotivational syndrome."

After making the above findings, which were denominated "the scientific findings", Senator Eastland went on to list what were denominated as "the social consequences of the marijuana epidemic":

> "The scientific evidence presented to the subcommittee

points to an array of frightening social consequences, or possible consequences.

(1) If the cannabis epidemic continues to spread at the rate of the post-Berkeley period, we may find ourselves saddled with a large population of semi-zombies - of young people acutely afflicted by the amotivational syndrome. There is evidence that many of our young people, including high school and junior high school students, are already afflicted by the "amotivational syndrome." The general lack of motivation of the current generation of high school students is a common complaint of teachers. Some of them point out that the growth of this phenomenon in recent years has roughly paralleled the spread of the cannabis epidemic.

(2) We may also find ourselves saddled with a partial generation of young people - people in their teens and early twenties - suffering from irreversible brain damage. Their ability to function may improve if they abandon cannabis, but they will remain partial cripples, unable to fully recover the abilities of their pre-cannabis years.

(3) The millions of junior high school and grade school children who are today using marihuana may

produce another partial generation of teenagers who have never matured, either intellectually or physically, because of hormonal deficiency and a deficiency in cell-production during the critical period of puberty. This fear was expressed in particularly urgent terms by Dr. Paton and Dr. Kolodny. As Dr. Paton put it, we may witness the phenomenon of a generation of young people who have begun to grow old before they have even matured.

(4) There are other frightening possibilities, too. There is the possibility of which Dr. Paton spoke that we develop a large population of youthful respiratory cripples. And there is the possibility - which can only be confirmed by epidemiological studies - that marihuana smokers are producing far more than their quota of malformed or genetically damaged children.

(5) There is the growing body of evidence that marihuana use leads to indulgence in other drugs.

(6) If the epidemic is not rolled back, our society may be largely taken over by a "marihuana culture" - a culture motivated by a desire to escape from reality and by a consuming lust for self-gratification, and lacking any higher moral guidance. Such a society could not long endure.

> These are some of the reasons why we cannot legalize marihuana, and why society cannot remain indifferent to the epidemic."

Lacking the confidence of Senator Eastland, this Court is not able to fully evaluate the extent to which the youth of America is presently being impacted by the use of marijuana. However, ours is an achievement oriented society, one that is competitive and dynamic. Expectations and demands upon our young people are as great as anywhere in the world. It does not seem rational to the Court to argue that marijuana will help our youth in the establishment or accomplishment of desirable goals.

To the extent that it is urged that legislation should be adopted which prohibits the use of marijuana only by those who have not attained their majority, two counter arguments seem eminently rational:

Such an approach in dealing with alco-

holic beverages has not prevented countless young lives from being lost or impaired, in part by reason of the easy availability of intoxicating beverages; and,

At the present time there is no available field test or other reliable method for detection of marijuana influence. This latter point seems to have significant ramifications in any consideration of an appropriate legislative response to marijuana use. This is particularly true in view of the evidence of the substantial number of hours that impairment persists after use of the drug.

The defense has argued that marijuana does not belong in Schedule I of RCW 69.50-.401(c), in that it is patently not a drug of "high abuse" potential. Certainly marijuana does not have the same potential for serious bodily harm as the other drugs scheduled therein. The argument is made

that certain drugs are not included that have a far greater potential for abuse than marijuana. This would appear to be true. Nonetheless, the reasons, both cultural and historical, why a legislative body includes or does not include particular drugs in its criminal statutes are exceedingly complex. Neither the evidence in this case or the legal authorities cited by counsel compel a conclusion that there is no fair and substantial evidence that marijuana has a high potential for abuse, nor that the failure to include certain drugs compels a striking down of the statute.

Finally, the defense has argued that the felony statute, in providing for a prison sentence of five years, constitutes cruel and unusual punishment. Again, the authorities cited by counsel do not establish that the defendant has standing to make this argument prior to conviction and

sentence. Notwithstanding, as with the other constitutional arguments raised by the defendant, the hazards presented to society by the use of marijuana do not permit this court to conclude that RCW 69.50.401-(c) is not fairly and substantially related to a legitimate legislative purpose.

Marijuana creates a euphoric state of intoxication which impairs learning, incentive, efficiency, and motor coordination, matters clearly affecting the health, education and welfare of the people of the state. The legislature is properly concerned with minimizing the impact of this social problem, and the challenged penal statute bears a fair and substantial relationship to the accomplishment of this objective.

The presumption of the constitutionality has not been overcome, the defense motion to dismiss will be denied, and a find-

ing of guilt shall enter.

DONE IN OPEN COURT this 1st day of December, 1977.

[John E. Rutter, Jr.]
JUDGE

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-101

IN THE

# Supreme Court of the United States

October Term 1980

James Henry Smith,
*Petitioner,*

*v.*

State of Washington,
*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

## BRIEF FOR RESPONDENT IN OPPOSITION

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## STATEMENT OF THE CASE

On December 1, 1977, petitioner James Smith was found guilty of possession of marijuana, in violation of Washington law. The defendant's prison sentence was deferred; he was placed on probation for three years and fined $500.00.

The facts underlying the charge have never been contested. Using marijuana seeds purchased at a local tavern, defendant began cultivating marijuana in two greenhouses located on his property. One of the greenhouses, 10 feet long by 8 feet wide, was located fifty feet from defendant's home.

For a period of approximately two years, Mr. Smith would smoke, on average, one or two marijuana cigarettes per day, occasionally in the presence of his two young children. He also provided marijuana to his wife and to visiting friends.

Law enforcement officers eventually learned of the marijuana garden and a warrant was issued authorizing a search of the residence as well as outbuildings on the property. The search warrant was executed on October 15, 1976. Marijuana was discovered during the course of the search, seized, and subsequently admitted into evidence during defendant's trial. The validity of the search warrant has never been challenged by the defense (Brief of Appellant at 3 n. 2).

The defendant moved to dismiss the information charging him with commission of a crime on three separate constitutional grounds: (1) violation of his right of privacy; (2) denial of equal protection; (3) imposition of cruel and unusual punishment (Petition at B4-B5). After a lengthy evidentiary hearing, the trial court denied the defense motion.

The same constitutional challenges were again raised

on appeal and also rejected by the Washington Supreme Court. *State v. Smith,* 93 Wn.2d 329, 332-33, 610 P.2d 869 (1980). Although the court divided on the issue of cruel and unusual punishment, both the majority and the dissent concluded that the constitutional right of privacy does not protect the use and possession of marijuana in the home. *Id.* at 345-48, 355. Chief Justice Utter, concurring in part and dissenting in part, did not reach the invasion of privacy claim. *Id.* at 354.

Defendant does not seek review in this Court of the equal protection and cruel and unusual punishment claims. Although the petition is in one sense limited to the right of privacy issue, defendant has reformulated his constitutional argument in terms of an asserted Fourth Amendment violation. Defendant now contends, for the first time, that the seizure of marijuana from a home pursuant to a search warrant is per se unreasonable (Petition at 23).

This contention was neither presented to nor passed on by either of the courts below. In fact, defendant's 95-page opening brief to the Washington Supreme Court contained only a passing reference to the Fourth Amendment (Brief of Appellant at 33-34), which did not warrant inclusion in his 13-page Table of Authorities.

## SUMMARY OF ARGUMENT

The question presented in this petition, asserting a violation of the Fourth Amendment, was neither raised nor decided in the lower state courts. Even assuming that the issue is properly before this Court, there is no merit in the defendant's argument.

Having neglected to challenge the validity of the search warrant, the defendant is restricted to the position that any warranted search of a home for marijuana is per se

unreasonable. This contention is faultily premised on the defense assumption that the State of Washington has no legitimate governmental interest in regulating the private use and possession of marijuana, a view which was expressly repudiated by the Washington Supreme Court. Furthermore, the Fourth Amendment claim is particularly inapplicable to the facts of the present case, involving seizure of marijuana not only from the defendant's home, but also from a greenhouse situated 50 feet from his home.

The defendant did raise the right of privacy issue in the courts below, though not in the context of a Fourth Amendment claim. The Washington Supreme Court concluded that the federal constitutional right of privacy does not encompass the private possession of marijuana in the home.

Contrary to the defendant's assertion, there is no authority in conflict with the state court's decision on this federal issue. Recognizing that the use and possession of marijuana does not implicate any specific constitutional guarantee and cannot be constitutionally distinguished from the possession of other prohibited drugs, lower courts have consistently rejected similar privacy challenges.

## ARGUMENT

### I.

### THE FEDERAL QUESTION PRESENTED FOR REVIEW WAS NEITHER RAISED NOR DECIDED BELOW.

It is well-settled that this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions," *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969), though there is some ambiguity as to whether the rule is based on jurisdictional or policy grounds.

The defendant's presentment of the issue and argument are not straightforward. Although reference is made to the constitutional right of privacy (Petition at 32, 35), which was clearly raised below, the essence of defendant's argument is that the search of his property was unreasonable, in violation of the Fourth Amendment.

> This Petition asks this Court to decide one limited and fundamental issue: whether, under the Fourth Amendment, there is a general right to be free from searches of homes which are 'unreasonable' because they are aimed at purely private activity which neither involves nor affects anyone other than the homeowner himself;

(Petition at 23).

Having so postured the issue, petitioner has erected substantial barriers to review. As previously stated, no Fourth Amendment issue was raised or decided in the state courts below. Nor was the validity of the search warrant ever contested.[1]

The record here is even more inadequate than that in *DeBacker v. Brainard,* 396 U.S. 28 (1969). In *DeBacker,* this Court declined to review a contention where the appellant "made only passing reference to the issue in his brief" to the Nebraska Supreme Court and the state court "did not pass on the issue, nor even refer to the contention." 396 U.S. at 32. *See also United States v. Ortiz,* 422 U.S. 891, 898 (1975).

But the most blatant deficiency here is the inconsistency between the defendant's Fourth Amendment claim, focusing on the privacy of the home, and the facts surrounding the search and seizure of his marijuana. Marijuana was seized from a greenhouse located approximately 50 feet

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1. Attorney Ford has represented the defendant throughout these proceedings.

from the defendant's home, as well as from the home itself.

The lower courts were not given an opportunity to determine whether or not this greenhouse was situated within the curtilage of the defendant's home. If it were not, and the "open fields" doctrine governed, the greenhouse would not be entitled to any Fourth Amendment protection. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), reaffirming *Hester v. United States*, 265 U.S. 57 (1924).

The inappropriateness of permitting review of this untimely issue could not be more evident.

## II.

## THE SEIZURE OF MARIJUANA FROM A PRIVATE RESIDENCE PURSUANT TO A VALID SEARCH WARRANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

There is no precedent in this Court suggesting that the seizure of marijuana from a home pursuant to a valid search warrant might constitute an unreasonable search. On the contrary, "valid warrants may be issued to search *any* property . . . at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978).

Defendant's reliance on *Payton v. New York*, ..... U.S. ....., 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), is misplaced. *Payton* merely reiterated the cardinal principle that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 100 S.Ct. at 1382. Here, of course, the State obtained a warrant, which has never been challenged and must be presumed valid.

The special constraints placed upon search warrants directed at material arguably protected by the First Amendment, *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979), have never been extended to seizures of "weapons, narcotics or cases of whiskey." *Stanford v. Texas,* 379 U.S. 476, 486 (1965). *See also Roaden v. Kentucky,* 413 U.S. 496 (1973).

The additional safeguards afforded books, pamphlets and movies derives from the unique vulnerability of protected expression. "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Marcus v. Search Warrants,* 367 U.S. 717, 731 (1961).

The rationale of these First Amendment cases is plainly inapplicable to the seizure of contraband. Defendant's argument that marijuana should be given special Fourth Amendment protection necessarily rests on his assertion that the private use and possession of the drug "impact no cognizable state interest." (Petition at 34). Neither the evidentiary record compiled below nor the decisional law, including the opinion of the Washington Supreme Court, supports such an assumption.

## III.

## THE STATE OF WASHINGTON MAY CONSTITUTIONALLY REGULATE THE PRIVATE USE AND POSSESSION OF MARIJUANA.

It is firmly established that the State of Washington may, in the exercise of its police power, regulate the use and possession of dangerous or habit-forming drugs. *Robinson v. California,* 370 U.S. 660 (1962); *Whipple v. Martinson,* 256 U.S. 41 (1921).

Correctly applying the rational relation test,[2] the Washington Supreme Court found that the state legislature could have reasonably concluded that marijuana is a dangerous drug.

> Our review of the record reveals certain critical facts which show that marijuana presents certain dangers, and that its prohibition is reasonably related to the public health and safety. Marijuana creates a euphoric state of intoxication which impedes learning, incentive, efficiency, and, importantly, motor coordination. There remains a conflict of expert opinions regarding the seriousness of marijuana's effects, and much has yet to be learned. From reading this record, we cannot say that all doubts about the safety of marijuana have been resolved in its favor.
>
> Assuming that the legislature had before it the evidence in this case concerning the known effects of marijuana and the as yet unknown properties of the drug, it could reasonably find that marijuana creates a danger to users and others.
>
> Furthermore, the legislature may well have considered more evidence than was brought before the trial court in this case. We cannot say, therefore, that the adoption of laws imposing criminal penalties was not reasonably indicated to protect the public welfare.
>
> We note that the apparent dangers of marijuana use have been recognized by other courts. Recent judicial opinions, including *Ravin v. State*, 537 P.2d 494 (Alaska 1975), find that in spite of advanced knowledge the suggested

---

2. "Where . . . the Congress has neither invaded a substantial constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate government interest." *Harris v. McRae*, 48 U.S.L.W. 4941, 4949 (U.S., June 30, 1980).

dangers are, as yet, rationally based. *See also Marcoux v. Attorney General,* ..... Mass. ....., 375 N.E.2d 688 (1978), *and see Blincoe v. State,* 231 Ga. 886, 204 S.E.2d 597 (1974); *State v. Kells,* 199 Neb. 374, 259 N.W.2d 19 (1977); *and see People v. Summitt,* 183 Colo. 421, 517 P.2d 850 (1974).

> In legislating for health, safety and welfare, certain constraints upon individual freedom have traditionally been imposed by the State. Often, such constraints protect both society generally and the individual personally from the perceived harm. *See e.g., State v. Laitinen, supra* (motorcycle helmet law sustained). It is not our proper function to substitute our judgment for that of the legislature with respect to the necessity of these constraints.
>
> We hold the statutory prohibitions against marijuana use are rationally related to the accomplishment of a legitimate governmental objective — public health and safety. As such, they are not violative of equal protection.

*State v. Smith, supra* at 93 Wn.2d 338-39 (notecalls omitted).

The court's finding was based on an independent review of the extensive evidentiary record. *Id.* at 335. It is consistent with the recent decision of a three-judge panel of the United States District Court for the District of Columbia, also made after a lengthy hearing on the effects of marijuana.

> Experts still strongly disagree about the safety of marijuana, and its long-term effects remain an open question. Studies indicate that marijuana may impair the circulatory, the endocrine, and the immunity systems of the body, alter chromosomes, and change cell metabolism. Although many dispute these findings, this contradictory

> evidence demonstrates that important questions about marijuana use persist.
>
> Given the continuing debate over marijuana, this court must defer to the legislature's judgments on disputed factual issues.

*NORML v. Bell,* 488 F.Supp. 123, 136 (D.D.C. 1980).

The federal district court recognized, as did the Washington Supreme Court, that "judicial deference is appropriate when difficult social, political, and medical issues are involved. Courts should not step in when legislators have made policy choices among conflicting alternatives." *NORML v. Bell, supra* at 137.

That it is not the function of the judiciary to make an independent appraisal of competing interests was clearly enunciated by this Court in resolving a challenge to another controversial enactment. "It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy." *Harris v. McRae,* 48 U.S.L.W. 4941, 4949 (U.S., June 30, 1980).

It cannot seriously be disputed that the State of Washington has the constitutional authority to proscribe the use and possession of marijuana.

## IV.

## THE FEDERAL CONSTITUTIONAL RIGHT OF PRIVACY DOES NOT ENCOMPASS THE PRIVATE POSSESSION OF MARIJUANA IN ONE'S HOME.

If the State of Washington has a legitimate interest in prohibiting the private use and possession of marijuana, that interest does not disappear upon a person's entrance to his home.[3] On the contrary, "[t]he mere fact that this

3. *See Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199, 1202 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976).

otherwise unprotected activity is conducted in the home does not, in itself, place it in the protected zone of the constitutional right of privacy." *Illinois NORML v. Scott*, 66 Ill. App. 3d 633, 23 Ill. Dec. 303, 383 N.E.2d 1330, 1332 (1978).

Defendant's contention that the United States Constitution guarantees the right to possess and use marijuana in one's home has been rejected by lower federal and state courts with monotonous regularity.[4] These authorities have not accepted proposals to extend *Stanley v. Georgia*, 394 U.S. 557 (1969), to include the private possession of marijuana.

In holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime,"[5] *Stanley v. Georgia, supra* at 568, this Court specifically limited the scope of its opinion.

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4. No less than fourteen decisions have upheld state proscription of private marijuana possession in the home, not including the opinion of the Washington Supreme Court. *United States v. Drotar*, 416 F.2d 914 (5th Cir. 1969), *vacated on other grounds*, 402 U.S. 939 (1971); *NORML v. Bell*, 488 F.Supp. 123 (D.D.C. 1980); *Louisiana NORML v. Guste*, 380 F.Supp. 404 (E.D. La. 1974), *aff'd*, 511 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975); *State v. Murphy*, 117 Ariz. 57, 570 P.2d 1070 (1977); *Laird v. State*, 342 So.2d 962 (Fla. 1977); *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974); *State v. Baker*, 535 P.2d 1394 (Hawaii 1975); *State v. Kincaid*, 98 Idaho 440, 566 P.2d 763 (1977); *Illinois NORML v. Scott*, 66 Ill. App.3d 633, 23 Ill. Dec. 303, 383 N.E.2d 1330 (1978); *State v. Chrisman*, 364 So.2d 906 (La. 1978); *Marcoux v. Attorney General*, .... Mass. ...., 375 N.E.2d 688 (1978); *State v. Kells*, 199 Neb. 374, 259 N.W.2d 19 (1977); *People v. Shepard*, .... N.Y.2d ...., .... N.E.2d .... (June 6, 1980); *Cavaness v. State*, 581 P.2d 475 (Okla. Cr. App. 1978), *cert. denied*, 439 U.S. 1117 (1979).

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5. Three Justices concurred in the result on the ground that the unauthorized screening of films violated the Fourth Amendment. The rationale of the concurring opinion formed the basis of this Court's opinion in *Walter v. United States*, 48 U.S.L.W. 4807 (U.S., June 20, 1980).

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

*Id.* at n. 11.

Thus, the simple response to the question presented by this petition is that the decision of the Washington Supreme Court does not conflict with *Stanley v. Georgia.*

The rationale underlying the disparate constitutional treatment afforded obscenity and drugs such as marijuana is readily apparent. The holding in *Stanley* derived not only from the First Amendment implications of the case,[6] but also from the absence of public impact of the proscribed activity. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 59 (1973). The State cannot here improve on the analysis and reasoning of the Massachusetts Supreme Judicial Court.

> Thus the *Paris Adult Theatre and Orito* cases were stressing the point that in *Stanley* the place of the possession, the confinement of the viewing of the material, reduced to a null force, or nearly so, any claim of deleterious public effects which could possibly legitimate the State's intrusion . . . The *Stanley* Court had indeed said, replying to the argument that the private reading of obscene matter would cause antisocial conduct, that there was 'little empirical basis' for

6. Defendant's belated attempt to ground his privacy claim in the Fourth Amendment demonstrates his recognition that the right of privacy encompasses only fundamental liberties and those rights created by specific constitutional guarantees. *Paul v. Davis,* 424 U.S. 693, 712-13 (1976).

> that assertion (394 U.S. at 566, 89 S.Ct. 1243) and in all events the 'least restrictive alternative' analysis familiar in First Amendment discussions would require that the State legislate against the antisocial behavior rather than the ideas that caused it. In contrast, in the case of marijuana, we are bound to assume for constitutional purposes that the private use does have public results, does spill over into the public domain and touch matters of legitimate State interest, while the freedom impaired by the penal statute, taken at its highest evaluation, does not reach the level of that freedom conceived by the Court to be implicated in *Stanley*.

*Marcoux v. Attorney General*, ..... Mass. ....., 375 N.E. 2d 688, 691 (1978).

Since defendant has not contested the findings of the Washington Supreme Court concerning the dangerousness of marijuana, his assertion that the private use of marijuana "demonstrably affects no public interest" (Petition at 23) is not persuasive.

However, the protection of the public from the harmful effects of marijuana is not the only state interest served by proscription. As the trial court recognized (petition at B27), the State of Washington has a legitimate and permissible objective in protecting the public from the intoxicating effects of the drug.

The governmental interest in prohibiting marijuana intoxication flows from the founding principles of our nation. The most fundamental concept of the democratic process is the free exchange of political ideas. To this end, the First Amendment functions to ensure that there will be a "marketplace of ideas," open to all political ideas, even those that perhaps a majority of citizens consider reprehensible. The risk of our democratic experiment is whether the "right" ideas shall prevail. In

short, the determinative factor in the success or failure of our system of government is the ability of the people to consider and decide the proper course for our nation to follow.

What governmental interest could then be more vital than the interest of insuring, to the extent possible, that the people are educated, mentally competent and in possession of reasoning powers sufficient to deal with complex political issues. The defense experts did not disagree with the trial court's finding concerning the effects of marijuana intoxication on the mind:

> Marijuana does interfere with the orderly processes of the mind . . . complex reasoning is interfered with, as is the ability to concentrate effectively . . . there is reliable evidence that information acquired during intoxication is not stored efficiently in the memory centers of the brain. (Petition at B17).

In analyzing the nature of marijuana as an intoxicant, potency is not the only significant factor. The drug is easily concealed and difficult to detect once ingested. One may become intoxicated from marijuana in a relatively brief period of time. Nor are there any harsh after-effects as is the case with alcohol intoxication.

Marijuana is a vastly more comfortable intoxicant to use than alcohol[7] and therein lies its greatest danger. A user, even an adolescent user, may spend a significant portion of his life intoxicated and, consequently, in an impaired mental state.

Indeed, a recent report submitted by the defendant himself shows that "[a]mong high school seniors nation-

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7. The State of Washington may constitutionally prohibit the private possession of intoxicating liquor, though it has chosen not to do so. *Crane v. Campbell,* 245 U.S. 304 (1917); *Mugler v. Kansas,* 123 U.S. 623 (1887); *State v. Giaudrone,* 109 Wash. 397, 186 P. 870 (1920).

wide, one in eleven reports using [marijuana] on a daily basis, up from one in twelve in 1976 and one in seventeen in 1975." MARIJUANA AND HEALTH, Seventh Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare at 2 (1978).

Defendant's argument is premised on his view that there are no social costs associated with the private use of marijuana. The State of Washington could not disagree more strongly.

## V.

## THERE IS NO CONFLICT OF AUTHORITY ON THE FEDERAL QUESTION PRESENTED.

Defendant asserts that the lower courts are divided on the federal right of privacy issue,[8] a split which he characterizes as "not wide [b]ut . . . deep." Petition at 41). The State of Washington submits that not only is the conflict of authority neither wide nor deep, in reality it is nonexistent.

In addition to some dissenting and concurring opinions, defendant relies on *State v. Kantner,* 53 Hawaii 327, 493 P.2d 306 (1972), *cert. denied,* 409 U.S. 948 and *Ravin v. State,* 537 P.2d 494 (Alaska 1975).

In *State v. Kantner, supra,* the Hawaiian Supreme Court upheld the classification of marijuana as a narcotic drug against an equal protection challenge. Defendant quotes dicta in the concurring and dissenting opinions in *Kantner* concerning the extent of the right of privacy.

The precedential value, if any, of these opinions was

8. There can hardly be a conflict of authority on the question of whether the seizure of marijuana from a home under warrant is per se unreasonable. The State is not aware of any case in which this "limited and fundamental issue" has even been raised, let alone decided.

nullified by the Hawaii Supreme Court's subsequent decision in *State v. Baker,* 535 P.2d 1394 (Hawaii 1975). *Baker* held, in the context of a privacy challenge, that neither that state's nor the federal constitution protects the possession of marijuana for personal use.

Defendant's reliance on *Ravin v. State, supra,* is equally misplaced. *Ravin* rested on a state constitutional provision, adopted in 1972, which explicitly guaranteed a right of privacy. Alaska Const., Art. 1, §22.

> Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home . . . .

*Ravin v. State, supra* at 504.

Far from creating a conflict on the federal question presented, *Ravin* has been widely perceived (and dismissed) as a decision on state constitutional grounds. *E.g., NORML v. Bell, supra* at 132 n. 23 ("The Alaska Court based its ruling on a new provision of the state constitution . . . ").

The Alaska Supreme Court has acknowledged that its holding in *Ravin* exceeded the scope of the federal constitutional right of privacy. Citing *Ravin,* the court recently conceded, "We think it clear from both section 22 and our decisional law that the right of privacy guaranteed to Alaska citizens is broader in scope than that guaranteed in the federal constitution." *State v. Daniel,* 589 P.2d 408, 416 (Alaska 1979).

In fact, the precedential impact of *Ravin* has been so insignificant that other state courts have declined to follow it in interpreting recent amendments to their own con-

stitutions also explicitly guaranteeing a right of privacy. *NORML v. Gain,* 100 Cal. App.3d 586, 161 Cal. Rptr. 181 (1979); *Zander v. District Court,* 591 P.2d 656 (Mont. 1979).

There is no conflict of authority on the federal question presented for review. The decisional law is logical, comprehensive and dispositive. As petitioner concedes, this Court has thrice previously denied petitions for certiorari raising the issue.[9] The same disposition is particularly appropriate here, where the petitioner has revised and restructured his argument in a manner not presented to the state courts below.

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9. *Louisiana NORML v. Guste,* 380 F.Supp. 404 (E.D. La. 1974), *aff'd,* 511 F.2d 1400 (5th Cir.), *cert. denied,* 423 U.S. 867 (1975); *State v. Kantner,* 53 Hawaii 327, 493 P.2d 306 (1972), *cert. denied,* 409 U.S. 948; *Cavaness v. State,* 581 P.2d 475 (Okla. Cr. App. 1978), *cert. denied,* 439 U.S. 1117 (1979).

## CONCLUSION

For the above-stated reasons, the State of Washington submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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**80-101**

No. 80-

IN THE

# Supreme Court of the United States

**October Term 1980**

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JAMES HENRY SMITH,
*Petitioner,*

v.

STATE OF WASHINGTON,
*Respondent.*

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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---

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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Petitioner hereby submits the following Reply to Respondent's Brief in Opposition:

1. The Court should not be misled by Respondent's attempt, through new counsel, to inject imagined procedural problems into this case at this late date. The question of home privacy set out in the petition is squarely and properly presented here.

a. Respondent's assertion that "no Fourth Amendment issue was raised or decided in the state courts below" (Resp. Br. at 4) is

incredible. In all petitioner's briefs and arguments, the issue was stated in Fourth Amendment terms:

> "the private home . . . [i]s a place which cannot be unreasonably searched or invaded by the government (U.S. Const. Amendment 4; Washington Const. Art.1 sec 7), a place where an individual may engage without restriction in purely private actions which might constitutionally be precluded elsewhere. See Stanley v. Georgia, supra; Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Ravin v. State, 537 P.2d 494, 503 (Alaska 1975)."

Def's Prelim. Memo. at 7, CP 143.

> "most importantly--'the Constitution extends special safeguards to the privacy of the home.' United States v. Orito, 413 U.S. 139, 142, 37 L. Ed.2d 513, 93 S.Ct. 2674 (1973). The Fourth Amendment explicitly recognizes the 'right of the people to be secure in their . . . houses,' . . . ."

Def's Third Memo at 11; App. Br. at 34. See also, e.g., Def. Third Memo at 8-9; RP 1079-83; App. Br. 32; App. Rep. Br. at 6.

Whenever any question of the nature of this claim was raised, it was made clear:

> "This is very much a search and seizure issue. This is the issue of whether the state can search and seize people's homes to get this substance . . . .

RP 76 (defense counsel argument).

> "[T]he Fourth Amendment . . . lies at the heart of the privacy claim advanced both here and below. . . . The Fourth Amendment requires more than just that proper procedures be followed before citizens' homes and lives are invaded. It requires that the invasion serve 'some governmental interest which is adequate to justify the imposition on the liberty of the individual.'. . . In a sense the issue in this case is one of pure Fourth Amendment law: whether the invasion of the Smith home was 'reasonable' . . . . That is the question in this case: whether RCW 69.50.401(c) is constitutional "as applied" (RB 1) to private marijuana possession in the home."

App. Reply Br. at 6.

It is exactly this argument--that the marijuana laws "are unconstitutional as applied to possession of marijuana for personal use in one's home," and "enforcement of these statutes under the above circumstances invades a right to privacy," State v. Smith, 93 Wn.2d 329, 345-6 (1980) --the court below rejected, by holding no separate right to privacy in the home exists. That holding squarely raises the question presented by this petition.

b. Respondent's suggestion petitioner's backyard greenhouse may have been outside "the curtilage of the defendant's home" (Resp. Brief at 5), was never made below. The accuracy and sufficiency of the factual premise that the "activity . . . was confined to areas in and around [petitioner's] private residence," State v. Smith, supra at 93 Wn.2d 332, has never before been questioned. The record contains no evidence or finding doubting the domestic character of the backyard greenhouse, or distinguishing it or the marijuana found in it from the rest of petitioner's property. Nor does the record show whether the amount of marijuana taken from that greenhouse could, alone, support petitioner's felony conviction. Respondent's attempt to factually subdivide the Smith residence and exclude part of it from the protection of the constitution is meritless and untimely, and should not be permitted to obscure the issue here.

2. Petitioner "has not contested the findings of the Washington Supreme Court concerning the dangerousness of marijuana" (Resp. Br. at 12), because no such findings underlay that court's declaration that the right to privacy does not "extend" to the private use of marijuana. See Petition at 19. If this Court reviews this case and holds the right to privacy in the home does have general application, it will remain to be decided, here or on remand, whether the transitory effects of marijuana use justify invasion of that right.

Respectfully submitted,

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